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Carl L. Gromek, Chief of Staff
State Court Administrator

MEMORANDUM

DATE: August 20, 2007

TO: The Justices

FROM: Carl L. Gromek

RE: State Court Administrative Office Response to:
►Position Statement of the Michigan Court of Appeals to SCAO Report of July 13, 2007
►Analysis of the SCAO Report by Court of Appeals Chief Judge William C. Whitbeck

STATE COURT ADMINISTRATIVE OFFICE RESPONSE TO

POSITION STATEMENT OF THE MICHIGAN COURT OF APPEALS TO SCAO REPORT OF JULY 13, 2007

BACKGROUND

On July 13, 2007, the State Court Administrative Office (SCAO) distributed its 2007 Judicial Resources Recommendations (JRR) for the Court of Appeals (COA) to the Michigan Supreme Court (MSC) Justices and COA Judges. On July 23, Chief Judge William C. Whitbeck responded with a Position Statement and his analysis of the SCAO report; on July 24, Chief Judge Pro Tem Brian K. Zahra presented a Dissenting Position Statement. When the accuracy of the dissenting position was questioned, Judge Zahra circulated copies of the COA's September 28, 2005, Long Range Planning Committee Judicial Retreat Topics, and the minutes of the COA's September 28, 2005, Judges Meeting. (Please see attachments.)

On July 25, 2007, the MSC held a conference to consider the SCAO Judicial Resources Recommendations. The Court did not take a position on the recommendations but, on a 4-3 vote, authorized the SCAO to release its report on August 1. The Court also asked the SCAO to respond to the COA Position Statement and Chief Judge Whitbeck's analysis of the SCAO report, but without addressing any constitutional questions.

POSITION STATEMENT OF THE COA

The COA's statement is divided into six sections:

I. Brief History
II. Constitutional Issues
III. "Balance"
IV. Implementation
V. Workload
VI. Conclusion

I. Brief History

SCAO Response:

Section I briefly recaps events leading up to the release of the SCAO Judicial Resources Recommendations, including the fact that Chief Justice Taylor "publicly stated his view [at the Annual Judicial Conference in April 2007] that, because of declining workload at the Court of Appeals, four judgeships at the Court should be eliminated." Section I also states that the SCAO recommendations are "precisely in line with the Chief Justice's prior public comments" but that the report "does not posit this decline [in COA filings] as in any way related to its recommendations."

In fact, the Chief Justice did not state at the Annual Judicial Conference that four COA judgeships "should be eliminated." Rather, he suggested that this possibility should be considered in light of the significant drop in case filings at the Court. In any event, the SCAO recommendations were not driven by the Chief Justice's public statement. It should also be noted that the COA's own Long Range Planning Committee considered the same possibility in 2005 regarding downsizing the COA. The SCAO's analysis includes charts, graphs, and historical analysis of COA filing trends, among other factors. It is completely inaccurate to suggest that declining filings at the COA were not "related" to the SCAO recommendations.

II. Constitutional Issues

SCAO Response:

Section II is a discussion of Article VI of the Michigan Constitution as it relates to the COA – namely, the contention that the size of the COA bench may be increased but not reduced under Article VI, section 8. A response to this section is outside the scope of the MSC's directions to the SCAO and hence also outside the scope of this memorandum.

III. "Balance"

Section III states:

> According to the SCAO Report, eliminating four judgeships at the Court of Appeals would "restore balance to the COA and allow for more efficient use of resources." The SCAO Report never defines or further explains the term "balance" nor does it outline why its proposals would be more "efficient" within the context of the operations of the Court of Appeals. The reason that the SCAO Report has not dealt with the rationale behind its selection of *four* judgeships for elimination—and therefore its proposal to use roughly half the "savings" to hire 11 additional pre-hearing attorneys—is that it has never grappled at all with the central question: *at an intermediate appellate court with a centralized research staff, what is the optimum ratio between the lawyers on that staff and the lawyers, including Judges, in the Judicial Chambers?*
>
> Presumably, when the SCAO Report refers to "balance" at the Court of Appeals, it is referring to this ratio. But there is not the slightest evidence that SCAO has even considered this question. Rather, it simply refers to restoring the proper balance to the court, states that the Court has historically "struggled to achieve the proper balance between judges and staff," and opines that "a proper balance of judges and staff will maximize efficiency." [Footnotes omitted.]

SCAO Response:

Balance, in the context of SCAO's analysis of the COA, refers to the state of equilibrium at any given time between COA judges and research attorneys that will produce the highest quality product in a timely and cost efficient manner. The report concludes in part that too much preparatory work has been shifted to judicial chambers in recent years, and thus that role is more properly played by staff attorneys.

"Balance" does not mean an optimal ratio that is fixed in stone. Balance requires flexibility and depends on a number of factors that may vary over time: the number and the type of appeals filed at the COA (interlocutory, of right, emergency, civil, criminal, termination of parental rights), the type of issues raised in the appeals (involving settled law, questions of first impression), the level of experience of the central research staff attorneys (prehearing, senior research, commissioner), and the case call configurations (regular, summary, complex).

The SCAO agrees, as Chief Judge William C. Whitbeck said in his analysis of the SCAO report, that the relationship between the judges of the COA and their lawyer support staff "is a serious issue [that] deserves serious consideration." The COA presently requires central research staff attorneys to attach proposed opinions to their reports, despite the acknowledged controversy over the years regarding the delegation of judicial functions. If the COA does succeed in obtaining additional funding for staff attorneys, as Chief Judge Whitbeck suggests should be done in his conclusion, the same issue remains. Regardless of what becomes of the SCAO report, the COA should reevaluate what is the appropriate and best use of central research staff attorneys and the necessary and best use of judicial resources. That is the first step in evaluating how many judges and staff attorneys are needed to decide the number of cases presently being filed in the COA. The SCAO has made this evaluation and believes that *reports* on cases are appropriately prepared by

staff attorneys and that, using these reports, *opinions* are appropriately prepared by judges and their clerks.

The SCAO recommended eliminating 4 judges because 24, instead of the present 28 judges, can supply the COA with a sufficient number of panels needed to decide all of the appeals presently being filed in the COA. By hiring additional research attorneys with the savings from the elimination of four judges, the COA will be able to have reports in all the appropriate appeals it chooses to hear. Doing so will provide the COA with greater flexibility in determining its monthly case call configuration.

The SCAO recommended hiring 11 additional prehearing attorneys only to demonstrate one possible research attorney configuration. The COA could have any combination of prehearing attorneys, senior research attorneys, and commissioners that it deems appropriate to prepare reports on the types and number of appeals that are being filed for the case call configurations the COA chooses. The COA can also reinstate the use of contract attorneys to prepare reports in termination of parental rights appeals. This is flexibility the COA does not have with sitting judges.

With respect to the proposed case call configuration, it may make sense for the COA to retain "complex" panels where the cases warrant the time of a judge and a clerk to prepare their own factual predicate and do their own legal research for the opinions. But doing so should be a matter of choice and not a function of too few central research attorneys. It is not an effective use of resources for judges and clerks to prepare bench memos in cases that would take an average prehearing attorney 28 days to complete. If this practice is not a matter of selective choice, it is not an efficient use of resources, and reflects a structural imbalance in the COA.

IV. Implementation

Section IV states:

> The SCAO Report give[s] no indication of how its proposals would be implemented, other than to indicate that the reduction of Judges would occur through "attrition." [Footnote omitted.]

SCAO Response:

Section IV is outside the scope of SCAO's inquiry, as directed by the MSC, and hence outside the scope of this memorandum.

V. Workload

Section V states:

The SCAO Report makes no attempt to explain why the elimination of four Judges should take place during a time when the workload *per Judge* at the Court of Appeals is increasing, both in terms of filings and dispositions. Indeed, the SCAO report cites workload data but makes no attempt to relate these data to its recommendations.

SCAO Response:

In fact, the per-judge workload at the COA is not increasing, as demonstrated by trends over the last 16 years:

1991 – 1995:
Average number of filings per judge (including visiting judges) = 384
Average number of dispositions per judge (including visiting judges) = 391

1996 – 2000:
Average number of filings per judge (including visiting judges) = 263
Average number of dispositions per judge (including visiting judges) = 288

2001 – 2006:
Average number of filings per judge (including visiting judges) = 263
Average number of dispositions per judge (including visiting judges) = 275

It should be noted that projected filings for the COA in 2007 will be approximately 500 cases less than in 2006.

VI. Conclusion

Section VI states:

The SCAO Report never addresses whether legislation decreasing the number of Judges on the Court of Appeals is in fact constitutionally possible. It never addresses the hard question of what the proper balance between the lawyers on the central research staff and the lawyers in the Judicial Chambers actually is. It never addresses the method of implementation other than to refer to "attrition." It never attempts to relate workload data to its recommendations.

We are gratified that the SCAO has now recognized the need for additional attorneys in the Research Division of the Court of Appeals. We note that the Court of Appeals has, in its annual budget presentations to the Legislature, for years been making the case for increasing the staff in that Division. However, given the considerable short and long-term implications of the SCAO's recommendation for the elimination of four judgeships at the Court of Appeals and the serious flaws in the analysis that underlies that recommendation, we oppose that recommendation and urge the Supreme Court not to adopt it. Attached is an analysis that Chief Judge Whitbeck has prepared reviewing the SCAO Report in greater detail.

SCAO Response:

The SCAO never questioned the COA's need for additional research attorneys. The SCAO questions the need for 28 judges on the COA when Michigan is mired in an economic crisis, and 24 judges can do the job.

It is obvious, based on recent experience, that the judicial branch cannot expect relief from increased budget allocations. That a possible tax increase will provide succor is speculative at best. Too, in the current economy, it is hard to argue for increased filing fees in the COA when the COA's current fees are already in the top five for intermediate appellate courts in the nation. A proposed fee increase, by itself, cannot solve the COA's budget problems and will further restrict access to the COA.

Reasonable people can disagree about the JRR's conclusions. But it is completely unreasonable to expect increased funding for more staff in the research division.

Consider that the COA has discontinued its contract attorneys program, which dealt with termination of parental rights cases, and has implemented eight involuntary furlough days when the Court is shut down except for emergencies. Hence, the COA is already short-staffed and has shut down its operations at various times so that it can continue to function the rest of the year. No fixes have been offered, other than the unrealistic one of obtaining more money through fees and budget increases. It is time to consider more long-term and innovative solutions.

STATE COURT ADMINISTRATIVE OFFICE RESPONSE TO

ANALYSIS OF THE SCAO REPORT
BY:
CHIEF JUDGE WILLIAM C. WHITBECK
MICHIGAN COURT OF APPEALS

The analysis is divided into nine sections:

I. Opinion Cases
II. The Last 20 Years
III. Correlation Coefficients
IV. Delay Reduction
V. Allocation of Resources
VI. Implementation
VII. Budgetary Matters
VIII. Fee Increases
IX. Fewer Judges, Less Work

I. Opinion Cases

Section I states in part:

> The SCAO makes no attempt to define "proper balance" between Judges and staff attorneys. But this sentence does glance off a very hard question: *to what extent in the process of reaching judicial decisions and articulating the reasons for those decisions should the Judges of the Court of Appeals rely on the analyses and proposed opinion language that attorneys in the Research Division provide?* The SCAO's answer, although not stated directly, is that the Judges should rely on these analyses and proposed opinion language to a greater extent than they do now.

SCAO Response:

Contrary to Chief Judge Whitbeck's suggestion, the SCAO believes that the judges of the COA should rely on the analysis and proposed opinion language provided by central research staff attorneys to a lesser extent than they do now.

The judges of the COA presently rely on case reports, prepared by central staff attorneys. These case reports present the facts, issues, arguments, and law; apply the law to the facts; and make a recommendation as to disposition. In addition, the judges of the COA presently rely on central staff attorneys to write *proposed opinions* that accompany these reports. Delegating opinion writing on such a large scale is a questionable practice.

Preparing case workups is properly delegated to central staff attorneys. The SCAO recommendation to add staff attorneys will increase the number of cases in which staff attorneys prepare reports. This, in turn, will free judges' time to write more opinions.

II. The Last 20 Years

Section II states:

> The SCAO Report next discusses the last 20 years of the Court's operations. With one exception, this discussion is also accurate and fairly straightforward. The exception relates to the summary chart. Here, the SCAO acknowledges, for the first and only time, the Court of Appeals' use of visiting Judges. This is significant both for what it says and what it does not say. The SCAO, by the use of the phrase "Annual Equivalent Visiting Judges," has apparently conceded both that the Court of Appeals used such Judges extensively during the 1990s and that such Judges were the equivalents of the elected Judges of the Court of Appeals.
>
> This is exactly contrary to the position of the Chief Justice on this point. The Chief Justice posited his argument for a reduction in the number of Judges at the Court of Appeals upon the decline in the number of filings (as the summary chart illustrates, the filings with the Court peaked in 1992 at 13,352 and declined to a low of 7,102 in 2001). When it was pointed out that the Court used a number of visiting Judges during that period but has not used such Judges in recent years—thus adjusting the number of Judges to the Court of Appeals' workload—the Chief Justice replied that visiting Judges were not equivalent to Court of Appeals Judges. Indeed, the Supreme Court's public information officer at one point made the statement that no visiting Judge had writing responsibility[5]. Obviously, on this point, the SCAO does not agree. In part this may stem from the fact that the SCAO had the responsibility of authorizing the use of visiting Judges.
>
> What the SCAO Report does not address at all is the workload *per Judge* at the Court of Appeals. As the chart below indicates, the workload per Judge, both in terms of filings and dispositions, has increased in recent years.

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Filings	9,108	8,866	8,264	7,731	7,460	7,102	7,156	7,445	7,055	7,629	7,951
Total Judges	39.73	31.36	28.91	28.73	28.82	28.45	28.00	28.09	28.00	28.00	28.00
Dispositions per Judge	272.9	326.6	304.6	268.5	270.6	267.3	273.1	274.3	260.5	280.5	295.6
Filings per Judge	229.2	282.7	285.9	269.1	258.8	249.6	255.6	265.0	252.0	272.5	284.0

> The reason for this omission is readily apparent: it is exceedingly difficult to argue that the number of Judges at the Court should be reduced at a time when the workload *per Judge* is increasing.

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[5] This statement was inaccurate. Visiting Judges had writing responsibility approximately 20% of the time

SCAO Response:

First, whether or not it was said that visiting COA judges had no writing responsibilities is of little matter when, in footnote 5, Chief Judge Whitbeck states that visiting judges only "had writing responsibility approximately 20% of the time."

Second, including 1996 in the chart skews the numbers in support of the erroneous conclusion that the workload per judge at the COA is increasing. As indicated on page 51 of the JRR, the COA used 11.73 visiting judges in 1996. Only in 1994 did the COA have as high a number of visiting judges. These visiting judges were not needed to handle new or current filings. Rather they were needed to eliminate the backlog of cases that had accumulated when filings were 12,369 in 1990; 11,825 in 1991; 13,352 in 1992; 12,494 in 1993; 11,287 in 1994; and 10,370 in 1995. The following chart more accurately reflects the workload of the COA judges over the past 16 years.

1991 – 1995:
Average number of filings per judge (including visiting judges) = 384
Average number of dispositions per judge (including visiting judges) = 391

1996 – 2000:
Average number of filings per judge (including visiting judges) = 263
Average number of dispositions per judge (including visiting judges) = 288

2001 – 2006:
Average number of filings per judge (including visiting judges) = 263
Average number of dispositions per judge (including visiting judges) = 275

The workload per judge at the COA is not increasing.

III. Correlation Coefficients

Section III states:

> The SCAO Report includes a short section on correlation coefficients. Its stated purpose is to support the contention that the Court of Appeals "can operate efficiently with fewer sitting judges." To the layperson the statements made in this short section are virtually incomprehensible. Rather clearly, filings at the Court are positively correlated with dispositions. Indeed, the correlation is perfect: for every filing there will ultimately be a disposition. Therefore, filings *cause* dispositions. Similarly, as outlined above, there is a positive correlation between filings and the use of visiting Judges: as filings decreased, so did the Court's use of visiting Judges. Thus, the decrease in filings *caused* the decrease in the use of visiting Judges, albeit with something of a lag in timing.
>
> Other than these rather commonsense observations, there is nothing in this section that actually supports the contention that the Court can operate more efficiently with fewer sitting Judges. The section is simply window dressing, with little if any analytical value. [Footnotes omitted.]

SCAO Response:

Section III requires no response, other than to point out that, as stated in the JRR, "There are significant negative correlations between COA judges and filings, total dispositions, opinions, and pending caseload. In 1995, the number of COA judges increased from 24 to 28. Conversely, the number of filings, total dispositions, opinions, and pending caseload decreased during the past decade." In other words, the number of judges went up, but, with fewer filings, the COA also generated comparatively fewer opinions and dispositions. While correlations do not necessarily reveal a causal relationship between two or more factors, an analysis of these factors is part of determining whether the COA needs 28 judges in order to function effectively.

IV. Delay Reduction

Section IV presents an overview of the COA's delay reduction effort, which the SCAO acknowledges is a remarkable achievement. Section IV describes the strategy involved and the results due to the judicial chambers handling more cases without central research staff reports and proposed opinions. The section also reminds the MSC that it is holding in abeyance proposals that would shorten various filing deadlines which, if adopted, would further reduce delay in the COA.

Section IV-C then states in part:

> The SCAO Report . . . states that, "There comes a point of diminishing returns in attempting to reduce the time it takes to decide a case on appeal." But the SCAO never states where that point might be. Certainly, the American Bar Association did not see diminishing returns when it set the gold standard of deciding 95% of the cases filed within 18 months of filing with an appellate court. Certainly the Legislature did not see diminishing returns when it adopted the same standard for the Court in the late 1990s. Certainly the Judges of the Court did not see diminishing returns when they unanimously adopted this goal in March of 2002.
>
> Thus, the SCAO once again completely fails to define or explain its terms. The question of when delay reduction becomes counter-productive is a serious one. The ABA, the Legislature, and the Judges of the Court have answered that question: not before the Court decides 95% of its cases in 18 months. The SCAO has walked away from the question entirely. [Footnote omitted.]

SCAO Response:

The American Bar Association's (ABA) time standard for decision by intermediate appellate courts is to decide 95 percent of the cases within one year of filing. (American Bar Association, *Standards Relating to Appellate Courts*, 1994 Edition, p 101).

The Michigan Legislature, in its budget bill for fiscal year 1998, adopted the ABA standard. 1997 PA 105, § 321, states in part, "[t]he state court administrative office, from funds appropriated in section 101, shall assist the court of appeals and trial courts to meet American bar association model standards on case processing, including the standard that 95% of all civil

appellate cases be disposed within 12 months of filing."

This time standard was also included in the 1999 and 2000 fiscal year budgets (1998 PA 335 and 1999 PA 126, respectively).

However, in fiscal year 2001, recognizing that the ABA standard was unachievable, the Legislature changed it. 2000 PA 264, § 310, states in part, "[t]he state court administrative office, from funds appropriated in part 1, shall assist the court of appeals and trial courts in resolving 90% of all cases within 18 months of their filing date."

The Legislature has not included a time standard for the COA in a budget bill since then.

Section IV-C further states:

> Interestingly, the SCAO returns to this theme in its section dealing with current and proposed case call configurations. There the SCAO states, "Even without budget reductions in 2007 and 2008, further delay reductions would be minimal and the cost, in both dollars and variance from traditional 'first case filled – first case decided' principals, would outweigh any gains." There are any number of problems with this sentence:
>
> • As noted above, were the Supreme Court to adopt the Court of Appeals' proposed rule changes, delay in Intake, all other things being equal, would decrease. There would be no cost to the state whatever in taking such action.
>
> • If there were no budget constraints, the Court of Appeals would be fully staffed at its authorized levels. Under such circumstances, there can be little question that the Court of Appeals would reach its delay reduction goals. Indeed, despite such constraints, the Court of Appeals has made surprising progress toward the goals in the second quarter of 2007.
>
> • Once again, the SCAO has failed to define or explain its terms. What costs at the Court of Appeals does the SCAO attribute to delay reduction? What costs does it attribute to an alleged variance from traditional "first-in, first-out" principles? How does the SCAO define "gains" from delay reduction and how does it quantify such gains in dollar terms? There is no hint in the SCAO Report that the SCAO has even considered these questions. [Footnotes omitted.]

SCAO Response:

The MSC has the proposed rule changes before it and will decide whether or not to adopt them.

The fact that the COA may have inadvertently accepted a nonexistent time standard does not make the time-reduction goal a bad one. What is questionable is moving cases to the front of the line, not because of their inherent urgency (as would be the case, for example, in termination of parental rights cases), but because they are easier and will improve statistics. This variance from traditional "first-in, first-out" principles affects the litigant who gets pushed back in the line for

efficiency's sake. As for dollar costs, the COA's expedited summary disposition docket program, which looked for easier cases but found difficult ones, had to be abandoned because the Court could no longer afford to keep it going. There is no money in Michigan's coffers. The COA cannot reasonably anticipate budget increases in the foreseeable future.

D. "First-In, First-Out"

Section IV-D states in part:

> The SCAO Report makes the extraordinary statement that, "New case management techniques, under the guise of greater efficiency, violate the traditional 'first-in, first-out' order of deciding cases on appeal[.]"
>
> * * *
>
> [B]y court rule, the Court of Appeals has for years departed from a strict adherence to a "first-in, first-out" rule, in certain circumstances and for rather obvious reasons: the Supreme Court has decided that certain classes of cases are of sufficient importance to be advanced to the head of the line, out of the normal "order" of deciding cases on appeal.
>
> As its footnote 14 makes clear, the SCAO's real target here is the Court of Appeals' expedited summary disposition docket. In its brief reference to that pilot program, the SCAO neglects to mention that:
>
> • Following the Supreme Court's November 2003 decision to hold the proposed rule changes affecting Intake in abeyance, it directed the Court of Appeals to "develop a plan that is in the best interests of the administration of justice."
>
> • After weeks of intensive study, a joint bench-bar task force, which included Justice Young and Carl Gromek, in a February 2004 public report unanimously recommended that an expedited summary disposition docket be created.
>
> • The Supreme Court accepted this recommendation and authorized the creation of such a docket at the Court on a pilot basis and later authorized the extension of the pilot.
>
> • Most importantly, nowhere in this entire process did anyone ever suggest that "under the guise of greater efficiency" that the Court was violating anything.
>
> As the report of the joint bench-bar task force makes clear, the purpose of the expedited summary disposition docket was to further reduce delay on appeal. Both the task force and the Supreme Court thought that this was of sufficient importance to justify the adoption of a six-month schedule for deciding appeals from trial court summary disposition. Thus, there was a conscious decision to take summary disposition appeals out of the normal "order" of deciding cases. [Footnotes omitted.]

SCAO Response:

The expedited docket was an experimental program and did not represent a decision by the MSC to permanently advance summary disposition cases "to the head of the line." Pilot programs are experimental by their very nature; over the years, the MSC has authorized numerous pilot programs to test various ideas and practices. The expedited summary disposition docket was one such program, aimed at reducing delay on appeal. After a year, during which the COA's pilot failed to meet its stated objectives, changes to the program were recommended that, if given an opportunity to be tested, might permit the program to achieve its goals. There was doubt expressed about continuing the pilot. In an e-mail to the Case Management Work Group (joint bench-bar task force referred to above), Carl Gromek, a nonvoting member, wrote on September 25, 2006:

> I have no horse in this race and I have no objection to anything the COA and those practicing before it agree to. I provide my observations and questions from reviewing these materials in order to expedite our discussions on Friday.
>
> The purpose or goal of the SD Track is to receive, process, and decide appeals from summary dispositions within 180 days of filing. The COA is achieving this goal in 26.5% of the SD Track cases.
>
> The most successful aspect of the SD Track is its popularity among litigants who are seeking prompt resolution of their appeals.
>
> In administering the SD Track, approximately one-third of the cases were not evaluated as routine appeals (four days or less) and approximately another one-third of the cases were placed on summary panels.
>
> So, what are the benefits to be gained by a SD Track (even if modified) in exchange for the cost of administering it and, if there are any, do they outweigh delaying decisions to litigants who filed their appeals prior to appeals involving summary disposition?

The MSC extended the pilot for another year with the express proviso that "*[t]he Court of Appeals and members of the bar should not presume that this extension in any way signals the Court's intention to eventually make the program permanent*." (Administrative Order 2004-5 as amended by the November 9, 2006, Order; emphasis added). At Chief Judge Whitbeck's request, citing the COA's "current budgetary situation and reduced staffing levels" in an April 27, 2007, letter to Chief Justice Taylor, the MSC suspended the expedited summary disposition docket indefinitely. (Third Amended Administrative Order No. 2007-2.)

V. Allocation of Resources

Section V states:

> The SCAO Report devotes considerable time to the question of allocation of resources; it contains a section on the present allocation of resources at the Court of Appeals and a section on its proposed reallocation of such resources. Again, the SCAO has gone seriously awry in its analysis:
>
> • The SCAO report asserts that, "Working within the parameters set by its budget and shrinking research division, the COA has been forced to shift more of the preparatory work on opinion cases to the judicial chambers." This is again inaccurate. The decision to route complex cases directly to the Judicial Chambers was made in 1997 when Justice Corrigan was Chief Judge of the Court and Carl Gromek was its research director. At that time the Research Division was apparently "cherry picking" cases, and the more complex cases were being unreasonably delayed. To remedy this problem, in December 1997, the Judges of the Court *chose* on a voluntary basis to take on, beginning in 1998, the additional tas[k] of working up bench memos for complex cases. The continuation of complex panels beyond 1998 was voted on at a December 1998 Judges' meeting. At that time, Mr. Gromek stated that the complex panel concept was absolutely necessary in 1998 because the Research Division was unable to meet case call demands. He then stated that the situation no longer existed. Nevertheless, a majority of Judges then voted to continue the use of complex case call panels. By Mr. Gromek's own words, this choice was unrelated to the budgetary situation at the time.
>
> • The SCAO Report now labels complex panels as "inefficient." It never explains why using young and relatively inexperienced pre-hearing attorneys to work up the most difficult cases that the Court decides is an "efficient" use of resources. But it assumes that these attorneys will, under its proposed configuration, perform just such a function.
>
> • Further, complex panel decisions are published with a greater frequency than the overall publication rate for decisions by the Court of Appeals. The publication rate for complex panels is roughly 18%; the publication rate for all decisions is 7.8%.
>
> • In addition, the Judges of the Court, as part of its delay reduction plan, chose in 2002 to take on a "no report" case as part of each regular case call. This decision preceded the truly serious budget problems that the Court has experienced in the last several years. [Footnotes omitted.]

SCAO Response:

Historically, there have been various times when the judges of the COA have agreed to take cases without reports because there were not enough research attorneys to prepare reports in all cases. Typically, the cases submitted to the panels without reports were of the easier variety, but the need to decide larger and more difficult cases that were sitting in the warehouse generated the "complex panels." Need was, once again, the mother of invention. When this need to utilize complex panels subsided, the judges of the COA chose not to discontinue their use, and complex panels became a regular part of the case call configuration.

However, preference and need must be tempered with appropriateness when considering efficiency. For example, a judge's preference to be assigned a case without an accompanying

report may be appropriate and efficient where the case presents complicated factual or procedural circumstances, or raises an issue of first impression. On the other hand, unless there is a need to assign a judge on a complex panel unremarkable cases that would take an average prehearing attorney 28 days to prepare, it is neither appropriate nor efficient to do so. The COA does not contend that the two complex panels it is scheduling each month are being assigned truly complex matters. In fact, assigning "no report" cases on the regular case call because of budget problems indicates otherwise.

Moreover, the COA's research division is not solely comprised of "young and relatively inexperienced prehearing attorneys." Senior research attorneys are experienced attorneys whose backgrounds include prehearing, judicial clerkships, and private practice. The senior research attorneys are the ones who prepare reports in the more complex cases.

A publication rate of roughly 18 percent for complex panels seems low where the publication rate for all decisions is 7.8 percent.

VI. Implementation

Section VI states:

> As noted above, the only reference in the SCAO Report to implementation is that the elimination of the four judgeships would be accomplished by "attrition." There is no discussion whatsoever of how four vacancies might occur roughly simultaneously in each of the Court's judicial districts so that there might be an orderly transition from a court of 28 Judges to a court of 24 Judges. Nor is there any indication as to when such a transition might occur. One might reasonably expect that, since any such reduction would have to be conducted pursuant to legislative action in form of statutory change, a draft of the proposed legislation would accompany the recommendation. There is no such draft in the SCAO Report. Thus, the SCAO has completely avoided the constitutional problem inherent in legislation reducing the number of Judges on the Court of Appeals. [Footnotes omitted.]

SCAO Response:

Section VI is outside the scope of SCAO's inquiry and this memorandum. It is for the Legislature to determine whether and how to eliminate four COA judgeships.

VII. Budgetary Matters

Section VII states:

> The SCAO Report anticipates savings of approximately $1,434,088 annually as a result of the elimination of the four judgeships. Of this, $770,000 would be reallocated to the Research Division to enable it to hire 11 additional pre-hearing attorneys. The remaining $644,088 would somehow be used to "save taxpayer dollars."

> Dealing with the last proposition first, anyone who has observed the budgetary process in Michigan in recent years recognizes that revenues flowing into the state treasury have been used (1) to fund existing or new governmental programs, (2) in times of surplus, to fund the budget stabilization fund, or (3) in the 1990s, to reduce taxes.
>
> The state is now in a time of significant budget crisis. Thus, those revenues that do flow into the state treasury will not be used to fund the budget stabilization fund or to reduce taxes. Indeed, the Governor and the Legislature are giving serious consideration to *raising* taxes.
>
> Thus, the $644,088 of unallocated "savings" from the elimination of four judgeships at the Court will not, under current circumstances, be returned to the taxpayers. Rather, these "savings" will in some fashion be reallocated to existing or new governmental programs. Thus, the implicit—but never stated—implication of the SCAO's recommendation is that the work of the Court of Appeals is less important than whatever might be accomplished by these unnamed programs. This implication is completely without support in the SCAO Report or, for that matter, anywhere else.
>
> Further, the notion that $770,000 of "savings" will be returned to the Court to allow it to hire 11 additional pre-hearing attorneys represents the triumph of hope over experience. One need look no further than recent actions with respect to the FY 2008 savings from the voluntary relinquishment of state vehicles by the Judges of the Court of Appeals and the Justices of the Supreme Court. Within weeks, those savings had been allocated by the Senate, in a bi-partisan vote, to the funding of a mental health court program, a program that has not been statutorily authorized in Michigan.
>
> Even assuming that an understanding—the more colloquial term is "deal"—might be reached with the Governor and the Legislature as to the return of this $770,000 to the Court, this understanding would, by its very nature, be ephemeral. One of the oldest axioms of the budgetary process is that one Legislature cannot bind another. Thus, any understanding with the current Legislature would not bind the next. Further, in an era of term limits, such an understanding would, as a practical matter, evaporate within a matter of a few short years. To proceed with the elimination of the four judgeships on this basis would, therefore, be an act of almost willful naïveté. [Footnotes omitted.]

SCAO Response:

Section VII requires no response, except to observe that government agencies have a continuing obligation to operate as efficiently as possible. It should be noted that the FY 2008 judicial budget has not been finalized. Even if money saved when the MSC and the COA gave up state cars is directed to another program by the state Legislature, it does not follow that giving up the state cars was the wrong decision, or that the judiciary should oppose cutting unnecessary judgeships because the money saved may be allocated elsewhere.

VIII. Fee Increases

Section VIII states:

> There are, of course, other methods of increasing the resources available in the Research Division without additional costs to the taxpayers. One such method is by increasing the fees to litigants. H.B. 4501, which the House Appropriation Committee has reported out with a favorable recommendation, would increase the fees that the Court of Appeals is authorized to pass and authorize a new fee. The Court of Appeals' staff estimates that the aggregate revenue increase from

> these increased fees would be approximately $270,500. At a total cost of $70,000 per new pre-hearing attorney, this would allow the hiring of approximately four such attorneys, assuming varying start dates. Chief Justice Taylor and the staff of the Supreme Court have, however, opposed such fee increases.
>
> There is no question that, as a matter of public policy, the taxpayers of Michigan should contribute to funding the operations of the Court of Appeals. The prompt and reasoned resolution of appeals from trial court decisions is undisputedly a public benefit. However, how *much* the taxpayers should contribute should be open to discussion. Currently, the ratio between GF/GP funds and revenues from fees is approximately 90/10. Shifting that ratio somewhat to the fee side will, if GF/GP appropriations are not reduced as an offset, achieve the goal of increasing staffing in the Research Division without reducing the number of Judges at the Court of Appeals.

SCAO Response:

The proposed fee increase would not solve the COA's budget crisis, but would restrict litigants' access to the COA. It should be noted that the COA's filing fees are already among the top four for intermediate appellate courts in the nation.

HB 4501 contains the COA filing fee increase, including language that would raise the filing fee for an appeal of right in that court from $375 to $415 (it was increased from $250 to $375 in 2003). The bill also includes raising the motion fee to expedite an appeal from $200 to $225, motion fees in general from $100 to $110, and a new $25 fee to be paid to the COA when filing an application for leave to appeal in the MSC.

If you look at the distribution of filing fees for intermediate appellate courts, in $100 increments, you see that the COA would rank third in the nation if HB 4501 passes.

Fees $ 0 - $100: 22 states
Fees $101 - $200: 14 states
Fees $201 - $300: 10 states
Fees $301 - $400: 2 states
Fees $401 - $500: 1 state (this is the group MI will be in if HB 4501 is enacted)
Fees $501 + : 1 state

The COA's current filing fees are already in the top four for intermediate appellate courts in the nation, and the proposed increase will only make the COA less accessible while failing to solve its budget problems.

IX. Fewer Judges, Less Work

Section IX states:

> Adoption of the recommendations of the SCAO Report will, in the simplest terms, result in fewer Judges at the Court of Appeals doing less work. In the name of "efficiency" the SCAO apparently

> has assumed that this is a desirable result and a public good. It is neither. Judges at the Court of Appeals are appointed or elected to carry out the responsibilities of their offices. When taken to their ultimate absurdity, the recommendations of the SCAO Report would result in a small number of Judges at the Court of Appeals functioning simply as appendages of the Research Division.
>
> It is certainly true that the relationship between the Judges of appellate courts and their lawyer support staff has been the subject of considerable controversy over the years. This is a serious issue and it deserves serious consideration. It should not be decided on the basis of a report such as the one the SCAO has prepared and presented to the Supreme Court. To do so would be a disservice to the citizens of this state in general and to the judiciary in particular. [Footnote omitted.]

SCAO Response:

SCAO agrees that the relationship between the judges of the COA and their lawyer support staff "is a serious issue [that] deserves serious consideration." The COA presently requires central research staff attorneys to attach proposed opinions to their reports despite the acknowledged controversy over the years regarding the relationship between judges and staff attorneys. The COA is presently seeking funds to add more staff attorneys. If additional funds are somehow found, these new attorneys presumably will be used in the same way as the attorneys presently serving the COA.

Regardless of what becomes of the JRR, the COA should reevaluate what is the appropriate and best use of central research staff attorneys and the necessary and best use of judicial resources. That is the first step in evaluating how many judges and how many staff attorneys are needed to decide the number of cases presently being filed in the COA. SCAO has made this evaluation and believes that reports on cases are appropriately prepared by staff attorneys and that, using these reports, opinions are appropriately prepared by judges and their clerks. It is on this premise that SCAO's recommendation regarding judicial need in the COA is based.

Attachments

cc: Court of Appeals Judges
Sandra Schultz Mengel
Larry Royster

Part III
Court of Appeals

INTRODUCTION

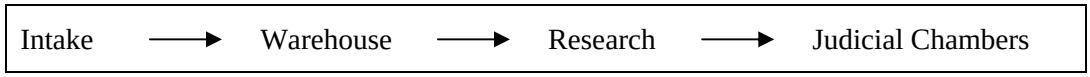
The State Court Administrative Office (SCAO) has not reviewed judicial need at the Court of Appeals (COA) since 1994. However, the dire fiscal circumstances that envelop Michigan state government have resulted in reductions to the COA's budget and, consequently, a shift in its method of operations.

This review shows that the current operations are out of balance and that reallocating resources at the COA would result in greater operating efficiencies. By reducing the number of judges on the COA from 28 to 24 and adding research attorneys, the COA could decide as many cases as it receives each year, restore balance to the court, and save taxpayer dollars.

OPINION CASES

The manner in which cases are processed in the COA is different from the way cases are decided in the trial courts. There are essentially two types of cases in the COA: opinion cases, which are decided by a written opinion, and order cases, which are disposed of by issuance of a brief statement granting or denying a request by a litigant. In recent years the COA has had approximately 3,500 opinion cases each year, representing approximately 45 percent of all annual dispositions. Opinion cases consume the vast majority of the COA's resources and, therefore, they determine workload and staffing needs. The caseflow process for opinion cases is explained below.

Process for Opinion Cases



Intake – When the initial papers are filed with the clerk's office, a file is opened and a docket number is assigned. The papers are reviewed for conformance with the court rules and for jurisdiction. Following the filing of the transcripts, briefs, and lower court records, the case is ready for research.

Warehouse – Once the case is ready for research, it is "warehoused" until a request comes from the research division to begin the process of preparing a report and, in over 90 percent of these cases, a proposed opinion. Before leaving the warehouse, the case is evaluated by the case screener who reviews the briefs, transcripts, and records. The screener notes the issues raised on appeal, notes the size of the lower court transcripts and records, and estimates the number of days it should take an average prehearing attorney to complete a report. This is called the case "day evaluation."

Research – The research division (for purposes of opinion cases) is comprised of prehearing and senior research attorneys. Prehearing attorneys are typically recent law school graduates who are hired for a period of one to three years. They prepare research reports in cases that are in the mid-range of difficulty. Senior research attorneys are experienced attorneys whose backgrounds include prehearing, judicial clerkships, and private practice. They prepare reports in the more complex cases. The research reports provide the judges with an objective statement of the facts, the parties' legal arguments, an independent legal analysis, and a recommended disposition. The

report is reviewed by a supervising attorney who assigns a "degree of difficulty evaluation" to the case. This evaluation represents the complexity of the case and is used to balance the workload among the three judges on the case call panel.

Judicial Chambers – Each month, the clerk's office assigns cases to case call panels comprised of three judges each. The COA uses three types of panels. Regular or weighted panels are assigned approximately 27 to 30 cases accompanied by research reports and proposed opinions. The judges on these regular panels are also assigned one case, allocated a "degree of difficulty evaluation" of three to four days, without research reports or proposed opinions. The other, less common, panel types are complex panels and summary panels. Complex panels are assigned cases without accompanying research reports according to the "day evaluation" made in the "warehouse," with each judge receiving a total of 28 evaluation days (regardless of whether the panel is given one, two, or three cases). Summary panels are assigned 60 routine matters with accompanying reports and proposed opinions. (Summary panel cases are generally not scheduled for oral argument, but can be scheduled at the panel's request.)

Regular or weighted case call panels typically sit for oral argument two days each month. Each judge on each panel receives the same set of documents for every case, regardless of writing assignments. The judge assigned to author the opinion receives the lower court record. Regular or weighted panels receive the reports on their cases approximately two weeks before oral argument. Following oral argument, each chamber (judge, law clerk, and secretary) circulates opinions for consideration by the other two panel members.

The bulk of the work required to process a case through the COA is performed by staff. This is not to minimize the judges' efforts or ultimate responsibility in deciding cases, but to point out that a proper balance of judges and staff will maximize efficiency.

THE LAST 20 YEARS

Historically, the COA has struggled to achieve the proper balance between judges and staff. When the COA first exceeded 8,000 filings per year, it had 18 judges. By the time filings dropped below 8,000, it had 28 judges. The number of research attorneys employed by the COA was largely a function of budgets. Nevertheless, the COA always seemed to be able to do what was necessary to get the job done.

The following table and graphs illustrate trends in the COA between 1987 and 2006.

Michigan Court of Appeals
1987 - 2006

Year	Filings	Total Dispositions	Clearance Rate[1]	Opinions	COA Judges	Annual Equivalent Visiting Judges	Central Research Staff Attorneys[2]	Average Day Evaluation of Cases
1987	8,186	7,502	91.6%	4,179	18	NA	53	NA
1988	8,545	8,508	99.6%	4,874	18	NA	49	NA
1989[3]	10,951	8,983	82.0%	4,976	24	NA	70	NA
1990	12,369	10,504	84.9%	4,729	24	NA	56	NA
1991	11,825	10,237	86.6%	4,627	24	0.27	38	NA
1992	13,352	11,662	87.3%	5,300	24	3.09	51	3.02
1993	12,494	13,037	104.3%	6,240	24	5.18	65	3.49
1994	11,287	12,824	113.6%	6,332	24	11.73	79	3.33
1995[4]	10,370	12,596	121.5%	5,968	28	10.09	85	3.49
1996	9,108	10,842	119.0%	4,774	28	11.73	75	3.72
1997	8,866	10,242	115.5%	4,418	28	3.36	80	3.94
1998[5]	8,264	8,806	106.6%	3,013	28	0.91	61	3.84
1999	7,731	7,715	99.8%	3,063	28	0.73	61	4.09
2000	7,460	7,799	104.5%	2,967	28	0.82	63	4.43
2001	7,102	7,606	107.1%	3,138	28	0.45	63	4.42
2002	7,156	7,647	106.9%	3,645	28	0.00	60	4.57
2003	7,445	7,706	103.5%	3,558	28	0.09	60	4.31
2004	7,055	7,293	103.4%	3,424	28	0.00	56	4.19
2005	7,629	7,853	102.9%	3,409	28	0.00	56	3.97
2006	7,951	8,278	104.1%	3,494	28	0.00	54	3.99

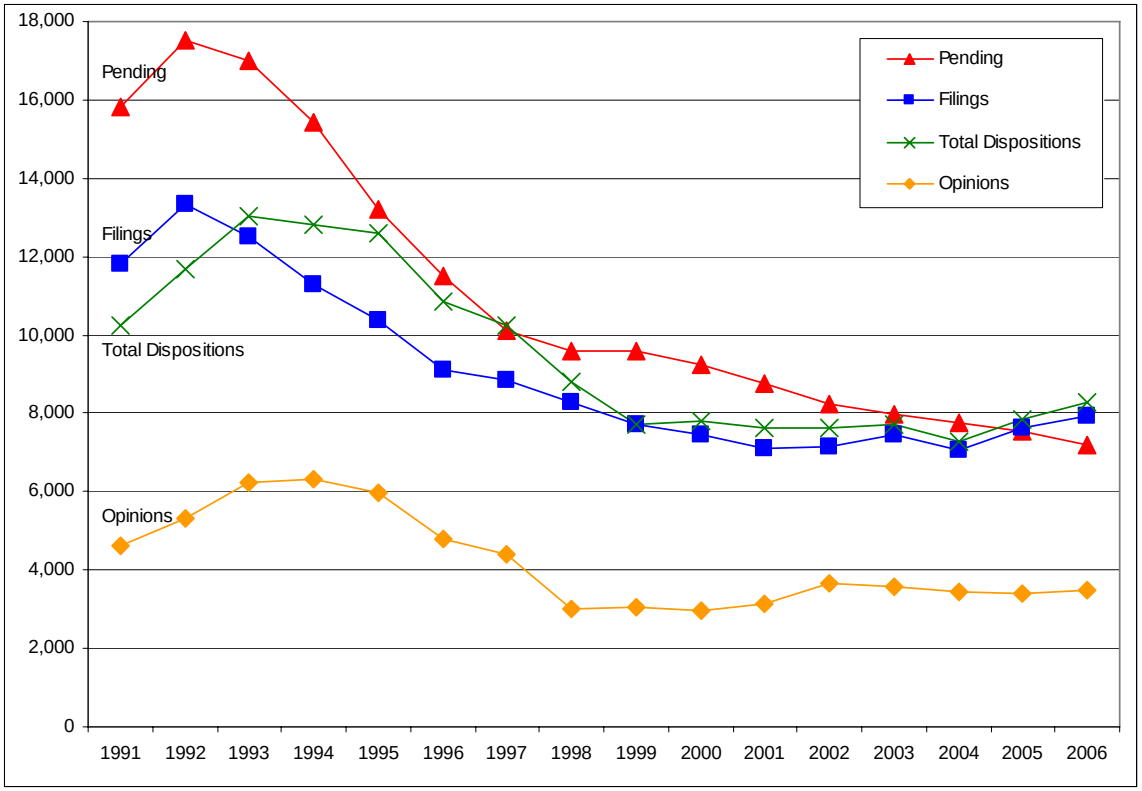
[1] Clearance rates are calculated by dividing the number of dispositions by the number of filings.

[2] Includes prehearing attorneys, senior research attorneys, and commissioners.

[3] In 1989, 6 judges were added to bring the total to 24 judges.

[4] In 1995, 4 judges were added to bring the total to 28 judges.

[5] The COA changed its method of counting the number of filings. Before 1998, COA statistics reflected one case per each lower court number that was referenced in a file. Starting in 1998, COA statistics reflect one case for each appeals court docket number regardless of how many lower court docket numbers may be referenced in that file. COA filing trends represent both a decrease in filings and a change in case counting methods.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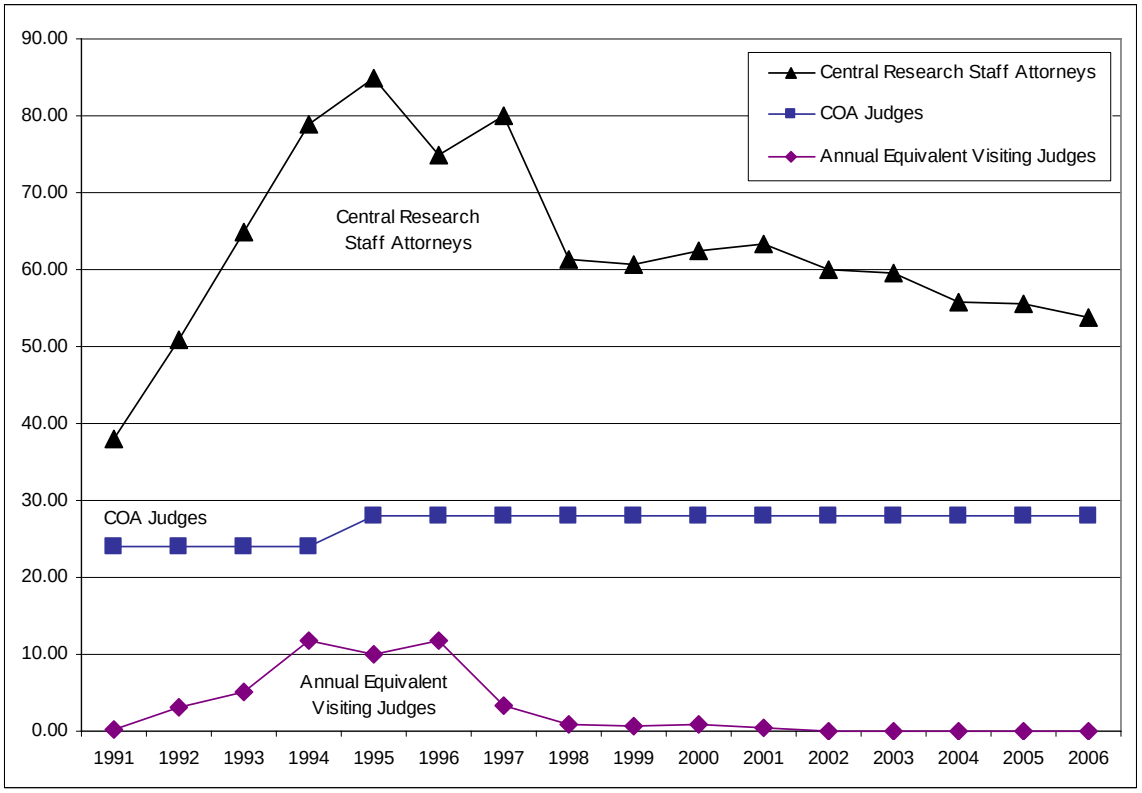
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Central Research Staff Attorneys
COA Judges
Annual Equivalent Visiting Judges
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2004
2005
2006
Central Research Staff Attorneys
COA Judges
Annual Equivalent Visiting Judges

Correlation Coefficients

A statistical analysis of the trends since 1991 supports the contention that the COA can operate efficiently with fewer sitting judges.

There are significant positive correlations between filings, total dispositions, opinions, pending caseload, and annual equivalent visiting judges. In other words, since 1991, new filings, total dispositions, opinions, pending cases, and visiting judges fluctuated in close unison, primarily in a downward trend. Filings and pending caseload were nearly 100 percent correlated, which is apparent in the graph. Visiting judges and pending caseload were also correlated, with visiting judges contributing to the decrease in pending caseload.

There are significant negative correlations between COA judges and filings, total dispositions, opinions, and pending caseload. In 1995, the number of COA judges increased from 24 to 28. Conversely, the number of filings, total dispositions, opinions, and pending caseload decreased during the past decade.

Correlations, whether they are negative or positive, do not necessarily reveal a causal relationship between two or more factors. One would not suspect that an increase in COA judges causes a decrease in filings; however, one might suspect that decreased filings contribute to a decreased pending caseload.

Correlation Coefficients

	Filings	**Total Dispositions**	**Opinions**	**Pending**
Total Dispositions	.880**			
Opinions	.847**	.965**		
Pending	.976**	.875**	.843**	
Annual Equivalent Visiting Judges	n.s.	.797**	.780**	.529*
COA Judges	-.895**	-.688**	-.706**	-.900**

** Correlation is significant at the 0.01 level (2-tailed).
* Correlation is significant at the 0.05 level (2-tailed).
n.s. Correlation was nonsignificant.

BACKLOG ELIMINATION

The COA added six judges in 1989, but it took until 1993 before the Court was finally able to dispose of more cases than it was receiving. Even after the COA increased to 28 judges in 1995, visiting judges were used because more staff attorneys were being employed to prepare a greater number of cases for decision. The focus was on reducing the backlog of opinion cases that had built up.

From 1993 through 1997, the COA averaged 10,425 filings, 11,908 dispositions, and 5,546 opinions. The average clearance rate (dispositions/filings) during this period was 114.2 percent. In other words, the COA disposed of more cases per year than it received in new filings. This was accomplished with an average of 26.4 COA judges, 8.4 visiting judges, and 76.8 central research staff attorneys. This level of staffing eliminated the backlog.

DELAY REDUCTION

The use of visiting judges was no longer necessary as filings dropped below 8,000 and remained relatively low. In 2001, the focus of the COA shifted to reducing the time it took to decide an opinion case. The COA decided 7,606 cases in 2001. Of those cases, 3,138 were opinion cases that took an average of 653 days from the date of filing to decision. At that time, a case spent 260 days in the "intake" stage where, after the case is docketed and reviewed for jurisdiction, the COA waits for the transcripts, briefs, and lower court records to be filed. Although the case was then ready for the research division, an average of 271 additional days passed in the "warehouse" until a research attorney was available to start researching the case and preparing a report.

Between 2001 and 2006, by shortening various filing deadlines, implementing new case processing procedures, and working hard, the COA was able to reduce the time from filing to opinion by 230 days. By the end of 2006, the COA was issuing an opinion within 423 days of a case's filing. Most of this reduction (190 days) occurred during the “intake” and “warehouse” phases of the process.

2001	260 Days		271 Days		61 Days	61 Days	= 653 Days
	Intake		Warehouse		Research	Judicial Chambers	
2006	182 Days		159 Days		52 Days	30 Days	= 423 Days

This substantial reduction in delay is a remarkable achievement. However, further delay reduction cannot continue within current and anticipated budgets. In fact, regardless of budgetary constraints, a court cannot decide more cases than it receives indefinitely. There comes a point of diminishing returns in attempting to reduce the time it takes to decide a case on appeal. New case management techniques, under the guise of greater efficiency, violate the traditional "first-in, first-out" order of deciding cases on appeal,[13] and, unless a sufficient pool of cases is available, a balanced case call cannot be prepared. Optimal results require the correct allocation of resources.

PRESENT ALLOCATION OF RESOURCES

Working within the parameters set by its budget and shrinking research division, the COA has been forced to shift more of the preparatory work on opinion cases to the judicial chambers. Presently, the COA is scheduling five regular or weighted panels per month. However, each judge on a regular panel is assigned one case without an accompanying research report. (Had that case been assigned to a research attorney, it would take the attorney three to four days to prepare a report and proposed opinion.) The COA is also scheduling two complex panels per month with each panel member assigned one to three cases without accompanying research reports. (Had those cases been assigned to a research attorney, it would take the attorney 28 days to prepare the reports and proposed opinions.) As a result, complex panels are able to handle approximately 6 cases instead of 30 cases.

[13] The expedited summary disposition docket was a pilot program started on January 1, 2005, in which the COA hoped to receive, process, and decide appeals from trial court orders granting or denying summary disposition within 180 days of filing. The goal was never achieved and on May 7, 2007, the pilot was suspended due to budget induced staff reductions.

The following analysis quantifies the annual contributions of judicial chambers preparing research reports and proposed opinions. It utilizes the estimates made by the COA case screener who reviews all cases before assignment, and estimates the number of days that it should take the average prehearing attorney to complete a report.

Regular Panels – There are 5 regular panels per month for 11 months per year and each panel consists of 3 judges. Each judge on a regular panel is assigned one case evaluated at three to four days without an accompanying research report. Therefore, the judges are assigned a total of 165 "no report" cases each year on regular panels. If the work requires an average of 3.5 days, judicial chambers spend 577.50 days per year preparing research reports and proposed opinions for regular panel cases.

Regular Panel Formula
5 panels x 11 months x 3 judges x 3.5 days = 577.50 days of work per year

Complex Panels – There are 2 complex panels per month for 11 months per year and each panel consists of 3 judges. Each judge on a complex panel is assigned one, two, or three cases without accompanying research reports. The aggregate day evaluation of each judge's assignments is 28 days. Therefore, judicial chambers spend 1,848.00 days per year preparing research reports and proposed opinions for complex panel cases.

Complex Panel Formula
2 panels x 11 months x 3 judges x 28 days = 1,848.00 days of work per year

Regular and Complex Panels – Adding together the days per year on regular and complex panel cases, judicial chambers spend a total of 2,425.50 days on research reports and proposed opinions for regular and complex panel cases. The "judge year" used in Parts I and II of this report to estimate trial court judges is 215 days per year. Applying this judge year, the COA judicial chambers are contributing a workload equal to 11.28 full-time prehearing attorneys by preparing research reports and proposed opinions for regular and complex panel cases.

Days of Work Per Year Formula
577.50 regular panel + 1,848.00 complex panel = 2,425.50 days of work per year

Full-Time Prehearing Attorneys
2,425.50 / 215 = 11.28 full-time prehearing attorneys

REALLOCATION OF RESOURCES

Requiring the judicial chambers to perform the work of prehearing attorneys is not the most efficient means of processing cases within the COA. However, the inability to vary the number of judges in response to budget constraints has led to reductions in staff attorneys. This caused some of the work normally performed by the research division to be moved to judicial chambers.

Each judicial chamber employs a judge, a law clerk, and a judicial assistant. Salary costs in 2007 for these positions in each judicial chamber are shown below:

	Judge	Law Clerk	Judicial Assistant	Total
Salary	151,441	65,730	51,072	268,243
Retirement & FICA (DC)	19,145	17,649	13,713	50,506
Insurances (employee & spouse)	13,267	13,286	13,220	39,773
Total	**183,853**	**96,665**	**78,005**	**358,522**

To reduce the number of COA judges by 4, from 28 to 24, would result in personnel savings of $1,434,088 annually. The cost of hiring 11 prehearing attorneys, at approximately $70,000 each, would be $770,000. The reallocation of $770,000 of this amount to provide increased staffing in the research division would restore balance to the COA and allow for more efficient use of resources.

CURRENT AND PROPOSED CASE CALL CONFIGURATIONS

Since 2001, when the COA focused on reducing the time it took to decide an opinion case, it has received an average of 7,390 filings per year and has averaged 7,731 dispositions per year. In other words, for the past six years, the COA has been deciding an average of 341 cases per year more than it receives for a clearance rate of 104.6 percent. As impressive as this is, it is not possible to continue deciding more cases than are filed indefinitely.

In fact, delay reduction in the COA, under its present composition and budget strictures, has reached a point where further reductions in the time it takes to decide an opinion case are impossible. Even without budget reductions in 2007 and 2008, further delay reduction would be minimal and the cost, in both dollars and variance from traditional "first case filed - first case decided" principles, would outweigh any gains. The focus must shift to maintaining the COA's present position with fewer resources.

The COA does need to decide as many cases as it receives each year to maintain its hard-earned gains. Using the average number of opinions issued by the COA since 2001 (3,445) and dividing it by the clearance rate (104.6 percent), the COA would have achieved a 100 percent clearance rate by issuing 3,293 opinions per year. What is so impressive is that the COA not only met that number, but exceeded it with its current case call configuration. Looking at a typical case call and not taking into consideration any production-enhancing efforts, the COA's current scheduling would be expected to produce approximately 3,100 opinions.

Current Scheduling (with 28 judges)

Monthly Schedule

2 Summary Panels (60 cases per panel) = 120 opinion cases

2 Complex Panels (6 cases per panel) = 12 opinion cases

5 Regular Panels (30 cases per panel) = 150 opinion cases

Annual Totals
282 cases per month x 11 months = 3,102 opinion cases per year

By reducing the number of judges on the COA from 28 to 24 and adding research attorneys, the COA could eliminate inefficient complex panels from the case call, decide approximately 3,300 opinion cases per year, and save money.

Proposed Scheduling (with 24 judges)

Monthly Schedule

2 Summary Panels (60 cases per panel) = 120 opinion cases

6 Regular Panels (30 cases per panel) = 180 opinion cases

Annual Totals
300 cases per month x 11 months = 3,300 opinion cases per year

The SCAO recommends reducing the number of COA judges from 28 to 24 through attrition and using approximately half the savings to hire research attorneys. This will allow the COA to eliminate the practice of assigning cases without accompanying research reports on its case call, decide as many cases as are filed (100 percent clearance), and save taxpayer dollars.

POSITION STATEMENT OF THE MICHIGAN COURT OF APPEALS
SCAO REPORT OF JULY 13, 2007

At a special Judges' meeting held on July 20, 2007, the Michigan Court of Appeals adopted the following position statement concerning the section of the July 13, 2007 report of the State Court Administrative Office detailing the 2007 Judicial Resources Recommendations for the Court of Appeals (the "SCAO Report").

I. Brief History

Several months ago, Chief Justice Taylor publicly stated his view that, because of a declining workload at the Court of Appeals, four judgeships at the Court should be eliminated. Chief Justice Taylor also said that he would ask the SCAO to study this situation and make recommendations as part of its 2007 Judicial Resources Recommendations. Chief Justice Taylor later asked Governor Granholm not to fill upcoming vacancies on the Court until that report is issued. The SCAO has now issued its recommendations as to the Court of Appeals.[1]

The SCAO Report recommends the elimination of four judgeships at the Court of Appeals, precisely in line with the Chief Justice's prior public comments. However, the SCAO Report makes few references to the declining number of filings at the Court of Appeals over the last ten years and does not posit this decline as in any way related to its recommendations. Rather, it bases it recommendations upon the notion that if four judgeships were to be eliminated, approximately $1,434,088 in personnel costs could be saved annually.[2] From these "savings," approximately $770,000 would be used to hire 11 additional pre-hearing attorneys in the Research Division of the Court of Appeals.[3] The rest of the "savings," approximately $664,088, would somehow be used to "save taxpayer dollars."[4]

II. Constitutional Issues

Article 6 of the 1963 Michigan Constitution[5] created the Court of Appeals and Chapter 3 of the Revised Judicature Act[6] and the Michigan Court Rules[7] govern its operations. The Legislature has increased the number of Judges on the Court of Appeals four times.[8]

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[1] The Judges of the Court of Appeals have neither received nor reviewed the balance of the 2007 Judicial Resources Recommendations, which presumably covers trial courts. The Judges, therefore, offer no opinion or statement of position concerning any such recommendations.

[2] SCAO Report, p 56.

[3] SCAO Report, p 56.

[4] SCAO Report, p 57.

[5] Const 1963, art 6.

[6] MCL 600.301, *et seq*.

[7] MCR 7.200, *et seq*.

[8] See 1968 PA 127, increasing the number of Judges from 9 to 12; 1974 PA 144, increasing the number of Judges from 12 to 18; 1986 PA 279, increasing the number of Judges from 18 to 24; and 1993 PA 190, increasing the number of Judges from 24 to 28.

With respect to the process for increasing the number of Judges on the Court of Appeals, the 1963 Constitution contains the following provision:

> The court of appeals shall consist initially of nine judges who shall be nominated and elected at nonpartisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law. The supreme court may prescribe by rule that the court of appeals sit in divisions and for the terms of the court and the times and places thereof. Each division shall consist of not fewer than three judges. *The number of judges comprising the court of appeals may be increased, and the districts from which they are elected may be changed by law.* [9]

As noted, the Legislature has increased, but never decreased, the number of Judges on the Court of Appeals. Given the literal language of the Constitution, which only authorizes *increases* in the number of Judges, it is questionable whether the Legislature has the authority to provide for a decrease.[10]

It might be argued that this is an absurd result, since such an interpretation would deprive the Legislature of the ability to adjust the number of Judges on the Court of Appeals downward in response to workload fluctuations. But in *Twp of Casco v Secretary of State*[11] and *People v McIntire*[12] the Supreme Court has rejected the absurd results "rule."

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[9] Const 1963, art 6, § 8 (emphasis supplied).

[10] See the comments of Robert J. Danhof, Chairman of the Judicial Branch Committee (and later Judge and then Chief Judge of the Court of Appeals): "The last sentence is self explanatory. If the work load becomes such that more judges are need, the legislature may by law *increase* the number of judges." 1 Official Record, Constitutional Convention 1961, p 1604 (Emphasis supplied). Later, while discussing a scheduling provision to "get the court operating[,]" Mr. Danhof stated, "Should the legislature see fit to *increase* the number of judges, they could fit them into the rotation as needed." *Id.*, pp 1604-1605 (emphasis supplied). But see the comment of delegate Boothby when proposing an amendment to Committee Proposal 92a that the "court could be enlarged or *lessened* according to the decision of the legislative body." *Id.*, p 1613 (emphasis supplied). Nevertheless, Committee Proposal 92a was referred to the Committee on Style and Drafting containing the *increased* language with no reference to a *decrease*; that Committee retained the *increased* language as did the Constitution that the Constitutional Convention and the voters adopted.

[11] *Twp of Casco v Secretary of State*, 472 Mich 566, 603; 701 NW2d 102 (2005). The Court stated:

> "[I]n *People v McIntire*, this Court rejected the absurd results 'rule' of construction, noting that its invocation is usually 'an invitation to judicial lawmaking. It is not the role of this Court to rewrite the law so that its resulting policy is more 'logical,' or perhaps palatable to a particular party or the Court. It is our constitutional role to give effect to the intent of the Legislature by enforcing the statute as written. What defendants in these cases (or any other case) may view as 'absurd' reflects an actual policy choice adopted by the majority of the Legislature and approved by the Governor. If defendants prefer an alternative policy choice, the proper forum is the Legislature, not this Court." [Internal footnotes omitted].

[12] *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).

Thus, while the Supreme Court might believe that it is illogical, or even absurd, to conclude that the Constitution does not authorize the Legislature to decrease the number of Judges on the Court of Appeals, it is not the role of the Supreme Court to rewrite the Constitution to make it more "logical" or more palatable to the Court.

In any event, there is a strong argument that the drafters of the Constitution and the voters who approved it intended to provide for *increases*, and not *decreases*, in the number of Judges on the Court of Appeals. It is certainly plausible that the drafters wished to guard against legislative action to decrease the number of Judges in response to a decision, or series of decisions, that the Legislature deemed to be unfavorable. Such a position would protect and preserve the independence of the judicial branch and safeguard its integrity.

Further, this situation presents the Supreme Court with a serious dilemma. The Supreme Court has traditionally been reticent about supporting or opposing legislation on the ground that the constitutionality of such legislation might come before the Court in subsequent litigation. (We assume that the Chief Justice and the SCAO would agree that a reduction in the number of Judges on the Court of Appeals can only be accomplished by legislative action). Here, the Chief Justice and the SCAO would of necessity be viewed as strong proponents of legislation to decrease the number of Judges on the Court of Appeals. Given the language of the Constitution, it is possible, if not probable, that there would be a court challenge to such legislation. How then would the Supreme Court respond to a challenge to such legislation, given the heavy involvement of the Chief Justice and the SCAO in its formulation?

III. "Balance"

According to the SCAO Report, eliminating four judgeships at the Court of Appeals would "restore balance to the COA and allow for more efficient use of resources."[13] The SCAO Report never defines or further explains the term "balance" nor does it outline why its proposals would be more "efficient" within the context of the operations of the Court of Appeals. The reason that the SCAO Report has not dealt with the rationale behind its selection of *four* judgeships for elimination—and therefore its proposal to use roughly half the "savings" to hire 11 additional pre-hearing attorneys—is that it has never grappled at all with the central question: *at an intermediate appellate court with a centralized research staff, what is the optimum ratio between the lawyers on that staff and the lawyers, including Judges, in the Judicial Chambers*?

Presumably, when the SCAO Report refers to "balance" at the Court of Appeals, it is referring to this ratio. But there is not the slightest evidence that SCAO has even considered this question. Rather, it simply refers to restoring the proper balance to the court,[14] states that the Court has historically "struggled to achieve the proper balance

[13] SCAO Report, p 56.

[14] SCAO Report, p 49.

between judges and staff,"[15] and opines that "a proper balance of judges and staff will maximize efficiency."[16]

IV. Implementation

The SCAO Report give no indication of how its proposals would be implemented, other than to indicate that the reduction of Judges would occur through "attrition."[17]

V. Workload

The SCAO Report makes no attempt to explain why the elimination of four Judges should take place during a time when the workload *per Judge* at the Court of Appeals is increasing, both in terms of filings and dispositions. Indeed, the SCAO report cites workload data but makes no attempt to relate these data to its recommendations.

VI. Conclusion

The SCAO Report never addresses whether legislation decreasing the number of Judges on the Court of Appeals is in fact constitutionally possible. It never addresses the hard question of what the proper balance between the lawyers on the central research staff and the lawyers in the Judicial Chambers actually is. It never addresses the method of implementation other than to refer to "attrition." It never attempts to relate workload data to its recommendations.

We are gratified that the SCAO has now recognized the need for additional attorneys in the Research Division of the Court of Appeals. We note that the Court of Appeals has, in its annual budget presentations to the Legislature, for years been making the case for increasing the staff in that Division. However, given the considerable short and long-term implications of the SCAO's recommendation for the elimination of four judgeships at the Court of Appeals and the serious flaws in the analysis that underlies that recommendation, we oppose that recommendation and urge the Supreme Court not to adopt it. Attached is an analysis that Chief Judge Whitbeck has prepared reviewing the SCAO Report in greater detail.

[15] SCAO Report, p 50.

[16] SCAO Report, p 50.

[17] SCAO Report, p 57.

ANALYSIS OF THE SCAO REPORT

By: William C. Whitbeck
Chief Judge, Michigan Court of Appeals

I. Opinion Cases

After a brief introduction, the SCAO Report turns to a discussion of opinion cases.[1] For the most part, this discussion is both accurate and unremarkable for the reason that it draws heavily, although without attribution, upon the publicly available initial report and subsequent progress report of the Court of Appeals with respect to its delay reduction program.

The discussion does, however, contain a closing paragraph that is freighted with meaning:

> The bulk of the work required to process a case through the COA is performed by staff. This is not to minimize the judges' efforts or ultimate responsibility in deciding cases, but to point out that a proper balance of judges and staff will maximize efficiency.[2]

The SCAO makes no attempt to define "proper balance" between Judges and staff attorneys. But this sentence does glance off a very hard question: *to what extent in the process of reaching judicial decisions and articulating the reasons for those decisions should the Judges of the Court of Appeals rely on the analyses and proposed opinion language that attorneys in the Research Division provide?* The SCAO's answer, although not stated directly, is that the Judges should rely on these analyses and proposed opinion language to a greater extent than they do now.

II. The Last 20 Years

The SCAO Report next discusses the last 20 years of the Court's operations. With one exception, this discussion is also accurate and fairly straightforward. The exception relates to the summary chart.[3] Here, the SCAO acknowledges, for the first and only time, the Court of Appeals' use of visiting Judges. This is significant both for what it says and what it does not say. The SCAO, by the use of the phrase "Annual Equivalent Visiting Judges," has apparently conceded both that the Court Of Appeals used such Judges extensively during the 1990s and that such Judges were the equivalents of the elected Judges of the Court of Appeals.

This is exactly contrary to the position of the Chief Justice on this point. The Chief Justice posited his argument for a reduction in the number of Judges at the Court of Appeals upon the decline in the number of filings (as the summary chart[4] illustrates, the filings with the Court peaked in 1992 at 13,352 and declined to a low of 7,102 in 2001). When it was pointed out that

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[1] SCAO Report, pp 49-50.

[2] SCAO Report, p 50.

[3] SCAO Report, p 51.

[4] SCAO Report, p 51.

the Court used a number of visiting Judges during that period but has not used such Judges in recent years—thus adjusting the number of Judges to the Court of Appeals' workload—the Chief Justice replied that visiting Judges were not equivalent to Court of Appeals Judges. Indeed, the Supreme Court's public information officer at one point made the statement that no visiting Judge had writing responsibility.[5] Obviously, on this point, the SCAO does not agree. In part this may stem from the fact that the SCAO had the responsibility of authorizing the use of visiting Judges.

What the SCAO Report does not address at all is the workload *per Judge* at the Court of Appeals. As the chart below indicates, the workload per Judge, both in terms of filings and dispositions, has increased in recent years.

	1996	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Filings	9,108	8,866	8,264	7,731	7,460	7,102	7,156	7,445	7,055	7,629	7,951
Total Judges	39.73	31.36	28.91	28.73	28.82	28.45	28.00	28.09	28.00	28.00	28.00
Dispositions per Judge	272.9	326.6	304.6	268.5	270.6	267.3	273.1	274.3	260.5	280.5	295.6
Filings per Judge	229.2	282.7	285.9	269.1	258.8	249.6	255.6	265.0	252.0	272.5	284.0

The reason for this omission is readily apparent: it is exceedingly difficult to argue that the number of Judges at the Court should be reduced at a time when the workload *per Judge* is increasing.

III. Correlation Coefficients

The SCAO Report includes a short section on correlation coefficients.[6] Its stated purpose is to support the contention that the Court of Appeals "can operate efficiently with fewer sitting judges."[7] To the layperson the statements made in this short section are virtually incomprehensible. Rather clearly, filings at the Court are positively correlated with dispositions. Indeed, the correlation is perfect: for every filing there will ultimately be a disposition. Therefore, filings *cause* dispositions. Similarly, as outlined above, there is a positive correlation between filings and the use of visiting Judges: as filings decreased, so did the Court's use of visiting Judges. Thus, the decrease in filings *caused* the decrease in the use of visiting Judges, albeit with something of a lag in timing.

[5] This statement was inaccurate. Visiting Judges had writing responsibility approximately 20% of the time.

[6] SCAO Report, p 53.

[7] SCAO Report, p 53.

Other than these rather commonsense observations, there is nothing in this section that actually supports the contention that the Court can operate more efficiently with fewer sitting Judges. The section is simply window dressing, with little if any analytical value.

IV. Delay Reduction

A. *Overview*

It is in this equally short section[8] that the SCAO Report goes seriously awry. It notes, accurately, that by end of 2006 the Court of Appeals had reduced the time it took to decide an opinion from 653 days on average to 423 days on average. The SCAO Report labels this reduction as a "remarkable achievement." Indeed it is; no other court in the country has achieved such a reduction in delay on appeal. Further, with one exception,[9] the Court of Appeals achieved this level of success without any meaningful increase in the resources available to it.

The SCAO Report then goes on, however, to sound the death knell for delay reduction. It states that, "further delay reduction cannot continue within current and anticipated budgets."[10] As outlined below, this is not accurate. But it is vitally important to understand that the Court's delay reduction efforts are, in the analysis the SCAO has undertaken, absolutely irrelevant to the recommendation to eliminate four Judges at the Court of Appeals. Nevertheless, the SCAO has chosen, in essence and for undisclosed reasons, to suggest that delay reduction be abandoned.

B. *Delay Reduction Strategy And Techniques*

The SCAO Report makes no mention of the strategy that propelled the Court of Appeals' delay reduction efforts. That strategy was straightforward and involved three prongs. The Court of Appeals' initial effort was aimed at reducing delay in the Judicial Chambers. This was almost immediately successful and Court cut the time in Chambers virtually in half. Remarkably, the Court achieved this result while the Judges and their staffs were taking on additional responsibilities for case processing.

With this achievement to point to, the Court aggressively sought, and with the invaluable assistance of then-Chief Justice Corrigan, temporarily obtained additional funding for Research Division attorneys. Staffing shortages in the Research Division were chiefly responsible for the delay in the Warehouse, where cases simply sat (for 271 days on average in 2001) because there

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[8] SCAO Report, p 54.

[9] The exception relates to the additional Research Division attorneys that the Court was able to hire as a result of legislative action. The Court funded these new hires with additional fee revenue that came to it as part of the comprehensive fee package that then-Chief Justice Corrigan was able to convince the Legislature to pass. Unfortunately, subsequent budget cuts and increases in costs outside the Court's control, primarily in the areas of insurance and retirement, have eliminated the Court's ability to maintain these higher staffing levels.

[10] SCAO Report, p 54. See also *Current And Proposed Case Call Configurations*, SCAO Report, p 56: "In fact, delay reduction in the COA, under its present composition and budget strictures, has reached a point where further reductions in the time it takes to decide an opinion case on appeal are impossible."

were insufficient Research Division attorneys to handle them. Notably, the Court has nonetheless reduced the time in the Warehouse (to 159 days on average at the end of 2006), due in part to the fact that the Judicial Chambers were handling more cases directly.

The third prong of the Court's strategy was to reduce the time in Intake. In July of 2002, the Court of Appeals submitted a number of proposed changes in the court rules that would have shortened various filing deadlines. The Supreme Court has held these proposals in abeyance. The SCAO Report's statement that part of the Court's delay reduction effort was in "shortening various filing deadlines"[11] is inaccurate with respect to these proposed amendments. The Court has *proposed* shortening filing deadlines; the Supreme Court has held these proposals in abeyance. Were these proposals to be adopted, all other things being equal, the average time in Intake would go down considerably and the Court would continue to achieve progress in its delay reduction efforts.

Thus, budgetary constraints—while vitally important with respect to reducing the delay in the Warehouse—do not entirely control the overall delay reduction effort. By their efforts, the Judges have reduced delay in their own Chambers *and* have taken some of the load off the shoulders of the Research Division. Were the Supreme Court to adopt the proposed rule changes, all other things being equal, delay in Intake would decrease and it might still be possible to come very close to reaching the Court's goal of deciding 95% of its cases within 18 months of filing despite the very adverse budget situation.

C. *Clearance Rates; Diminishing Returns*

The SCAO Report makes the commonsense observation that "a court cannot decide more cases than it receives indefinitely."[12] Certainly this is true, but only over the very long run. The Court of Appeals has achieved clearance rates of over 100% since 1993, with the only exception being 1999 when the clearance rate was 99.8%.

The SCAO Report then states that, "There comes a point of diminishing returns in attempting to reduce the time it takes to decide a case on appeal."[13] But the SCAO never states where that point might be. Certainly, the American Bar Association did not see diminishing returns when it set the gold standard of deciding 95% of the cases filed within 18 months of filing with an appellate court. Certainly the Legislature did not see diminishing returns when it adopted the same standard for the Court in the late 1990s. Certainly the Judges of the Court did not see diminishing returns when they unanimously adopted this goal in March of 2002.

Thus, the SCAO once again completely fails to define or explain its terms. The question of when delay reduction becomes counter-productive is a serious one. The ABA, the Legislature, and the Judges of the Court have answered that question: not before the Court decides 95% of its cases in 18 months. The SCAO has walked away from the question entirely.

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[11] SCAO Report, p 54.

[12] SCAO Report, p 54.

[13] SCAO Report, p 54.

Interestingly, the SCAO returns to this theme in its section dealing with current and proposed case call configurations.[14] There the SCAO states, "Even without budget reductions in 2007 and 2008, further delay reductions would be minimal and the cost, in both dollars and variance from traditional 'first case filled – first case decided' principals, would outweigh any gains."[15] There are any number of problems with this sentence:

- As noted above, were the Supreme Court to adopt the Court of Appeals' proposed rule changes, delay in Intake, all other things being equal, would decrease. There would be no cost to the state whatever in taking such action.

- If there were no budget constraints, the Court of Appeals would be fully staffed at its authorized levels. Under such circumstances, there can be little question that the Court of Appeals would reach its delay reduction goals. Indeed, despite such constraints, the Court of Appeals has made surprising progress toward the goals in the second quarter of 2007.

- Once again, the SCAO has failed to define or explain its terms. What costs at the Court of Appeals does the SCAO attribute to delay reduction? What costs does it attribute to an alleged variance from traditional "first-in, first-out" principles? How does the SCAO define "gains" from delay reduction and how does it quantify such gains in dollar terms? There is no hint in the SCAO Report that the SCAO has even considered these questions.

D. "First-In, First-Out"

The SCAO Report makes the extraordinary statement that, "New case management techniques, under the guise of greater efficiency, violate the traditional 'first-in, first-out' order of deciding cases on appeal[.]"[16]

First, note the pejorative nature of the language that the SCAO uses. "Guise" implies some manner of subterfuge. "Violate" implies some type of improper action. Apparently, therefore, the SCAO believes that when the Supreme Court gave priority to interlocutory criminal appeals,[17] child custody cases,[18] interlocutory appeals from the grant of preliminary injunction,[19] appeals from all cases involving election issues,[20] appeals from decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation including in the Michigan Administrative Code, or any other action of the legislative of executive branch of

[14] SCAO Report, pp 56-57.

[15] SCAO Report, p 56.

[16] SCAO Report, p 54.

[17] MCR 7.213(C)(1).

[18] MCR 7.213(C)(2).

[19] MCR 7.213(C)(3).

[20] MCR 7.213(C)(4).

government is invalid,[21] and other cases that the Court of Appeals orders expedited,[22] it was engaging in some type of improper subterfuge.

Obviously, the SCAO cannot believe these things. The point here is that, by court rule, the Court of Appeals has for years departed from a strict adherence to a "first-in, first-out" rule, in certain circumstances and for rather obvious reasons: the Supreme Court has decided that certain classes of cases are of sufficient importance to be advanced to the head of the line, out of the normal "order" of deciding cases on appeal.

As its footnote 14[23] makes clear, the SCAO's real target here is the Court of Appeals' expedited summary disposition docket. In its brief reference to that pilot program, the SCAO neglects to mention that:

- Following the Supreme Court's November 2003 decision to hold the proposed rule changes affecting Intake in abeyance, it directed the Court of Appeals to "develop a plan that is in the best interests of the administration of justice."[24]

- After weeks of intensive study, a joint bench-bar task force, which included Justice Young and Carl Gromek, in a February 2004 public report unanimously recommended that an expedited summary disposition docket be created.

- The Supreme Court accepted this recommendation and authorized the creation of such a docket at the Court on a pilot basis[25] and later authorized the extension of the pilot.[26]

- Most importantly, nowhere in this entire process did anyone ever suggest that "under the guise of greater efficiency" that the Court was violating anything.

As the report of the joint bench-bar task force makes clear, the purpose of the expedited summary disposition docket was to further reduce delay on appeal. Both the task force and the Supreme Court thought that this was of sufficient importance to justify the adoption of a six-month schedule for deciding appeals from trial court summary disposition. Thus, there was a conscious decision to take summary disposition appeals out of the normal "order" of deciding cases.

The program proved to be very popular among litigants (if not so popular among lawyers). As a result, there were a significant number of cases on the expedited docket and many of them were

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[21] MCR 7.213(C)(5).

[22] MCR 7.213(C)(6).

[23] SCAO Report, p 54.

[24] AO No. 2003-6.

[25] AO No. 2004-5.

[26] Amended AO 2004-5.

of greater complexity than the task force anticipated. Upon the Court of Appeals' recommendation, the Supreme Court ultimately suspended the pilot program.

E. *Conclusion*

For reasons that are not readily apparent, the SCAO has chosen to introduce a critique of the Court of Appeals' delay reduction effort into the SCAO Report. Its key points are incorrect, undefined, and irrelevant. Its ultimate sentence, that "[o]ptimal results require the correct allocation of resources[,]" is of course true. But the SCAO never indicates what such optimal results might be or how the Court of Appeals' delay reduction effort was or is in any sense an incorrect allocation of resources. The results that the Court of Appeals has achieved in this effort are, indeed, remarkable and even more remarkably the Court of Appeals has achieved these results without a permanent increase in staffing resources. Rather, the Court of Appeals has achieved great success primarily through managing its *existing* resources. Simply put, the Court of Appeals' Judges and its staff have worked harder and smarter and according to a publicly announced and available plan. The results speak for themselves.

V. Allocation Of Resources

The SCAO Report devotes considerable time to the question of allocation of resources; it contains a section on the present allocation of resources at the Court of Appeals[27] and a section on its proposed reallocation of such resources.[28] Again, the SCAO has gone seriously awry in its analysis:

- The SCAO report asserts that, "Working within the parameters set by its budget and shrinking research division, the COA has been forced to shift more of the preparatory work on opinion cases to the judicial chambers."[29] This is again inaccurate. The decision to route complex cases directly to the Judicial Chambers was made in 1997 when Justice Corrigan was Chief Judge of the Court and Carl Gromek was its research director. At that time the Research Division was apparently "cherry picking" cases, and the more complex cases were being unreasonably delayed. To remedy this problem, in December 1997, the Judges of the Court *chose* on a voluntary basis to take on, beginning in 1998, the additional task of working up bench memos for complex cases. The continuation of complex panels beyond 1998 was voted on at a December 1998 Judges' meeting. At that time, Mr. Gromek stated that the complex panel concept was absolutely necessary in 1998 because the Research Division was unable to meet case call demands. He then stated that the situation no longer existed. Nevertheless, a majority of Judges then voted to continue the use of complex case call panels.[30] By Mr. Gromek's own words, this choice was unrelated to the budgetary situation at the time.

[27] SCAO Report, pp 54-55.

[28] SCAO Report, pp 55-56.

[29] SCAO Report, p 54.

[30] December 1998 Judge's Meeting minutes, p 4.

- The SCAO Report now labels complex panels as "inefficient."[31] It never explains why using young and relatively inexperienced pre-hearing attorneys to work up the most difficult cases that the Court decides is an "efficient" use of resources. But it assumes that these attorneys will, under its proposed configuration, perform just such a function.[32]

- Further, complex panel decisions are published with a greater frequency than the overall publication rate for decisions by the Court of Appeals. The publication rate for complex panels is roughly 18%; the publication rate for all decisions is 7.8%.

- In addition, the Judges of the Court, as part of its delay reduction plan, *chose* in 2002 to take on a "no report" case as part of each regular case call. This decision preceded the truly serious budget problems that the Court has experienced in the last several years.

VI. Implementation

As noted above, the only reference in the SCAO Report to implementation is that the elimination of the four judgeships would be accomplished by "attrition."[33] There is no discussion whatsoever of how four vacancies might occur roughly simultaneously in each of the Court's judicial districts so that there might be an orderly transition from a court of 28 Judges to a court of 24 Judges. Nor is there any indication as to when such a transition might occur. One might reasonably expect that, since any such reduction would have to be conducted pursuant to legislative action in form of statutory change, a draft of the proposed legislation would accompany the recommendation. There is no such draft in the SCAO Report. Thus, the SCAO has completely avoided the constitutional problem inherent in legislation *reducing* the number of Judges on the Court of Appeals.[34]

VII. Budgetary Matters

The SCAO Report anticipates savings of approximately $1,434,088 annually as a result of the elimination of the four judgeships.[35] Of this, $770,000 would be reallocated to the Research Division to enable it to hire 11 additional pre-hearing attorneys.[36] The remaining $644,088 would somehow be used to "save taxpayer dollars."[37]

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[31] SCAO Report, p 57.

[32] See SCAO Report, p 55 referring to 11.28 "prehearing attorneys" whose work is now being done in the Judicial Chambers.

[33] SCAO Report, p 57.

[34] Const 1963, art 6, § 8.

[35] SCAO Report, p 56.

[36] SCAO Report, p 56.

[37] SCAO Report, p 57.

Dealing with the last proposition first, anyone who has observed the budgetary process in Michigan in recent years recognizes that revenues flowing into the state treasury have been used (1) to fund existing or new governmental programs, (2) in times of surplus, to fund the budget stabilization fund, or (3) in the 1990s, to reduce taxes.

The state is now in a time of significant budget crisis. Thus, those revenues that do flow into the state treasury will not be used to fund the budget stabilization fund or to reduce taxes. Indeed, the Governor and the Legislature are giving serious consideration to *raising* taxes.

Thus, the $644,088 of unallocated "savings" from the elimination of four judgeships at the Court will not, under current circumstances, be returned to the taxpayers. Rather, these "savings" will in some fashion be reallocated to existing or new governmental programs. Thus, the implicit—but never stated—implication of the SCAO's recommendation is that the work of the Court of Appeals is less important than whatever might be accomplished by these unnamed programs. This implication is completely without support in the SCAO Report or, for that matter, anywhere else.

Further, the notion that $770,000 of "savings" will be returned to the Court to allow it to hire 11 additional pre-hearing attorneys represents the triumph of hope over experience. One need look no further than recent actions with respect to the FY 2008 savings from the voluntary relinquishment of state vehicles by the Judges of the Court of Appeals and the Justices of the Supreme Court. Within weeks, those savings had been allocated by the Senate, in a bi-partisan vote, to the funding of a mental health court program, a program that has not been statutorily authorized in Michigan.

Even assuming that an understanding—the more colloquial term is "deal"—might be reached with the Governor and the Legislature as to the return of this $770,000 to the Court, this understanding would, by its very nature, be ephemeral. One of the oldest axioms of the budgetary process is that one Legislature cannot bind another.[38] Thus, any understanding with the current Legislature would not bind the next. Further, in an era of term limits, such an understanding would, as a practical matter, evaporate within a matter of a few short years. To proceed with the elimination of the four judgeships on this basis would, therefore, be an act of almost willful naïveté.

VIII. Fee Increases

There are, of course, other methods of increasing the resources available in the Research Division without additional costs to the taxpayers. One such method is by increasing the fees to litigants. H.B. 4501, which the House Appropriation Committee has reported out with a favorable recommendation, would increase the fees that the Court of Appeals is authorized to

[38] *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660; 698 NW2d 350 (2005) ("Therefore a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature."). See also *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002).

pass and authorize a new fee. The Court of Appeals' staff estimates that the aggregate revenue increase from these increased fees would be approximately $270,500. At a total cost of $70,000 per new pre-hearing attorney, this would allow the hiring of approximately four such attorneys, assuming varying start dates. Chief Justice Taylor and the staff of the Supreme Court have, however, opposed such fee increases.

There is no question that, as a matter of public policy, the taxpayers of Michigan should contribute to funding the operations of the Court of Appeals. The prompt and reasoned resolution of appeals from trial court decisions is undisputedly a public benefit. However, how *much* the taxpayers should contribute should be open to discussion. Currently, the ratio between GF/GP funds and revenues from fees is approximately 90/10. Shifting that ratio somewhat to the fee side will, if GF/GP appropriations are not reduced as an offset, achieve the goal of increasing staffing in the Research Division without reducing the number of Judges at the Court of Appeals.

IX. Fewer Judges, Less Work

Adoption of the recommendations of the SCAO Report will, in the simplest terms, result in fewer Judges at the Court of Appeals doing less work. In the name of "efficiency" the SCAO apparently has assumed that this is a desirable result and a public good. It is neither. Judges at the Court of Appeals are appointed or elected to carry out the responsibilities of their offices. When taken to their ultimate absurdity, the recommendations of the SCAO Report would result in a small number of Judges at the Court of Appeals functioning simply as appendages of the Research Division.

It is certainly true that the relationship between the Judges of appellate courts and their lawyer support staff has been the subject of considerable controversy over the years.[39] This is a serious issue and it deserves serious consideration. It should not be decided on the basis of a report such as the one the SCAO has prepared and presented to the Supreme Court. To do so would be a disservice to the citizens of this state in general and to the judiciary in particular.

[39] See, for example, Mary Lou Stow and Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet*?, 75 Judicature 216 (1972). But see also David J. Brown, *Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth*, 75 Judicature 291 (1992).

DISSENTING POSITION STATEMENT OF THE MICHIGAN COURT OF APPEALS REGARDING THE SCAO REPORT OF JULY 13, 2007

In 2005 the Judges of the Court of Appeals discussed whether in severe and dire financial times the Court should consider asking the Legislature to reduce through attrition the number of judges on the Court from 28 to 24, and returning to the Court the resources that supported the eliminated judicial seats. This would allow the Court to better support the remaining judges while continuing to efficiently provide essential services to the people of Michigan. The members of the Court vigorously debated the pros and cons of such action. The Court did not resolve in 2005 whether a reduction in the number of judges is a viable or preferred method of addressing a budget crisis, and the issue has not been addressed by the Court of Appeals since that time.

It is the view of some judges in the Michigan Court of Appeals that the Court ought not support or oppose the SCAO report at this time. There are numerous Constitutional, statutory, factual and budgetary issues that merit thorough examination. We look forward to discussing these important issues with the Governor, Justices of the Michigan Supreme Court, members of the Legislature and the State Bar of Michigan in the months ahead.

Brian K. Zahra
Chief Judge Pro Tem

Richard A. Bandstra
Kurtis T. Wilder
Christopher M. Murray
Pat M. Donofrio

LONG RANGE PLANNING COMMITTEE
JUDICIAL RETREAT TOPICS
SEPTEMBER 28, 2005

INTRODUCTION:

The Long Range Planning Committee (LRPC) was asked, among other things,[1] to assume the Court will experience repeated budget cuts in each of the next five years and recommend the areas the Court should cut and the priority of such cuts. In addition, the LRPC was asked to consider whether there are other tactical and/or strategic changes in the operation of the Court that we ought to consider implementing. The LRPC was also asked to identify issues for discussion in a pro/con format that can be utilized by Dr. Dale Lefever to facilitate a discussion of these issues at the September 28, 2005 Judicial Retreat. The LRPC has identified the following Issues for discussion:

1. Are employee layoffs or other tools to implement salary reductions options of last resort?

YES

Employee layoffs and salary reduction actions adversely impact the morale of the Court's employees, and might undermine the productivity and quality of work. The Court should exhaust every other cost-cutting measure before resorting to measures that impact our loyal employees, many of whom have already sacrificed greatly under prior budget cuts.

NO

While certain cost-cutting measures can be implemented without greatly impacting the productivity or quality of the Court, at some point employee layoffs or implementation of other tools to contain salary costs (like a banked leave program or a furlough program) are preferred to cutting non-employee costs that are essential to the operation of the Court. For example, the Court needs to continue improving its technological capacity and, at some point, the need to expend funds on technology outweighs the cost of maintaining the current staff level, especially less productive employees. Thus, while layoffs and other salary reduction tools ought not be employed without due consideration, they are not options of last resort.

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[1] The LRPC was asked to assume both good and bad budget scenarios and recommend budget action accordingly. Due to the poor financial outlook of the Court's budget in the foreseeable future, the LRPC has identified only topics that are pertinent assuming repeated budget cuts for Fiscal Years 2006 through 2010.

2. Should the Court adopt a banked leave program?[2]

YES

If the Court must take action that impacts the salary of our employees, it should implement a banked leave program because the employees ultimately will be fully compensated for their time. Unlike furlough days, the Court will continue to operate at 100% capacity, although payroll costs are reduced by 5%. Moreover, when economic times are better, the state may, as it has done in the past, fund the banked leave liability that accrued from implementation of the banked leave program. Finally, although pay is reduced, the employees' base salary rates are unaffected and thus future COLA's and step increases will be calculated on the unaffected base pay.

NO

Banked leave is nothing more than a deferral of a liability that the Court will have to satisfy sometime in the future. The Court is in a financial crisis, and banked leave does nothing to alleviate it; it merely delays and magnifies the problem. A banked leave program adversely impacts employee morale, because employees are asked to work 100% of the time for 95% pay. Moreover, such a program cannot be implemented without permission of the Supreme Court, and the Supreme Court has declined to approve of banked leave programs in the past.

3. Should the Court adopt a furlough program?[3]

YES

A furlough program is preferred to banked leave time because our employees are not asked to work without timely compensation. Further, the Court does not incur a long-term liability under a furlough program. While employee morale may be impacted, we can schedule Court-wide furlough days around holidays, thereby allowing employees to spend extra holiday time with their families. Moreover, Court productivity is usually reduced around the holidays in any event. In addition, to lessen the financial hardship on our employees, we can schedule Court-wide furlough days in the months with three pay periods, usually June and December. So, for example, if we implement 6 furlough days—3 between Christmas and New Years, and 1 each with Memorial Day, July 4 and Labor Day—our employees will receive three paychecks in or near the months in which 5

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[2] "Banked Leave" has become very popular in other areas of State government. Essentially, the employee works a full week but is paid only 95% of his or her time. The remaining 5% is "Banked Leave," which can be used to take time off with pay at a later date or it can be paid into the employee's 401k deferred compensation plan at the time the employee severs employment with the Court. The employee is compensated for his or her banked leave time at his departing salary, regardless of whether the time was originally banked at a lower rate of pay.

[3] Under a furlough program the employee is told not to report to work on the furlough day and the employee's salary is reduced accordingly. A furlough program can be implemented through Court-wide closures or by allowing the employee to select the days he or she wants off without pay.

of the 6 furlough days are scheduled. Finally, although pay is reduced, the employees' base salary rates are unaffected and thus future COLA's and step increases will be calculated on the unaffected base pay.

NO

Furlough days are nothing more than a pay reduction for our employees. While the Court may close, the work must be done before and after the closure and our employees will not be compensated for this work. Moreover, our government salaries are not so lucrative that we can expect our employees to be able to absorb a pay cut. If we must reduce pay, it should be done through a banked leave program where our employees will eventually receive the compensation they are due. Finally, the holidays, particularly the year-end holidays, are the last days in which the Court should implement a Court-wide reduction in salary considering its negative impact on morale and the fact that many employees face higher bills as a result of holiday gift giving.

4. Should Judges voluntarily share judicial assistants to reduce the number of judicial assistants employed by the Court?

YES

The current system of assigning one judicial assistant to each Judge was implemented at a time (1965) when assistants typed opinions and other documents from dictation or long-hand using carbon copies. Given the technological advances of the past 40 years, there is no need to maintain judicial staffing at the same level. In the private sector, lawyers billing 2000 hours per year are sharing assistants with two other lawyers who are also billing 2000 hours per year. We need to make better use of our limited resources. By going to a two judge to one assistant ratio (through attrition), the Court would save $900,000 annually. Moreover, while there may be privacy issues that arise from a sharing of judicial assistants, there should be no confidentiality issues.

NO

Confidentiality issues preclude sharing judicial assistants. Moreover, in recent months, the Clerk's Office has assigned to the judicial assistants work traditionally performed by the Clerk's Office or Research Division, such as printing of research reports and opinions, motions affecting case call, and transcripts associated with the motion docket. With this recent reassignment of work into judicial chambers, now is not the time to place additional work on our judicial assistants.

5. Should proposed opinions be dropped from research reports?

YES

With the reduction of our Research Division due to budget cuts, we must devise ways to handle the same number of cases with less resources. Further, Judges will be better prepared and better understand the cases if they are forced, with their staff, to draft opinions in order to resolve cases. Historically, draft opinions did not always accompany

research reports. They were added at a point when the Research Division had the time and resources to include them. Given these tougher economic times, the Court no longer has the resources to include proposed opinions with research reports.

NO

The amount of time incurred by the research staff to create a proposed opinion, after drafting a research memorandum, is minimal. Court resources are more efficiently utilized by having the research staff draft proposed opinions simultaneously with the research report than having judicial chambers draft opinions after case call.

6. Should the Court reduce the number of Districts from 4 to 3 or from 4 to 2?

YES

Multiple districts are provided, in part, for the convenience of the litigants and bar. Given difficult financial times, multiple districts may be a luxury the Court can no longer afford.

NO

The cost savings that results from the elimination of one or two district offices is insignificant and is not justified, given the reduction in services that will result. Further, such a change cannot be undertaken without legislative approval. The number of Court-wide filings remains the same and the number of employees needed to process these files would be, for the most part, unchanged. Moreover, once the Legislature eliminates Court districts, it is unlikely they will ever be restored, even when economic times are better.

7. Should the Court ask the Legislature to reduce (through attrition) the number of Judges from 28 to 24?

YES

If costs continue to escalate without commensurate appropriations from the Legislature, the Court will be required to make deeper and deeper cuts in personnel-related expenditures and the Judges of the Court will not be able to effectively and efficiently manage the Court's docket. If we are required to cut our resources to the point that the Court's Research Division cannot produce enough cases on the monthly case call to keep 28 Judges working full time, we owe it to the tax payers to ask the Legislature to reduce through attrition the number of Judges on our Court and allow us to use the resources once dedicated for those four Judges to enhance the services provided by our Court. The Legislature increased from 24 to 28 the number of Judges on the Court of Appeals in 1992, at a time when it appeared the number of case filings would continue to increase. However, the number of case filings has not only failed to increase, but has decreased substantially since the Court expansion. While the Court has made great improvements in resolving cases more rapidly and with more detailed and, presumably, better reasoned opinions, Court efficiency cannot continue to improve if the Legislature refuses or is unable to adequately fund the Court.

NO

The Court is an equal branch of government that is entitled to adequate funding from the Legislature. The Court ought not relinquish its independence or authority due to the failure of the Legislature to adequately fund the Court. Instead, the 28 Judges of the Court should exercise their best efforts to provide adequate government services, notwithstanding inadequate funding.

8. Should the Judges of the Court of Appeals voluntarily relinquish their State-provided automobiles?

YES

Economic times are disastrous and the State cannot afford to provide its executives with automobiles. If the Court reimbursed every Judge for his or her business miles, the Court would still save approximately $200,000 per year. State funded automobiles are a luxury the State can no longer afford to provide.

NO

Unlike other state elected officials, the Judges of the Court of Appeals and Justices of the Supreme Court are not provided with an expense account to maintain a district office. The Justices of the Supreme Court and the Judges of the Court of Appeals were provided cars because they were not provided State office expense accounts. Moreover, these cars are part of the Judges' and Justices' compensation. The Judges have not had an increase in pay since 2002 and it does not appear that any increase in pay is possible before 2009. Elimination of our State-provided automobiles would amount to a pay reduction many Judges cannot afford to incur. Finally, once the cars are given up, they will likely never again be provided, even in the very best of economic times.

Judges Meeting
September 28, 2005 – Novi

Present:

Chief Judge William C. Whitbeck
Chief Judge Pro Tem Michael R. Smolenski
David H. Sawyer
William B. Murphy
Janet T. Neff
E. Thomas Fitzgerald
Helene N. White
Richard A. Bandstra
Joel P. Hoekstra
Jane E. Markey
Peter D. O'Connell
Michael J. Talbot
Kurtis T. Wilder
Brian K. Zahra
Patrick M. Meter
Donald S. Owens
Kirsten Frank Kelly
Christopher M. Murray
Pat M. Donofrio
Karen Fort Hood
Bill Schuette

Absent:

Mark J. Cavanagh
Kathleen Jansen
Henry William Saad
Hilda R. Gage
Jessica R. Cooper
Stephen L. Borrello
Alton T. Davis

Chief Judge Whitbeck welcomed the Judges to the meeting[1] and called for approval of the minutes from the April 26, 2005, meeting. The minutes were approved.

Chief Judge Report

Budget

For FY05, Chief Judge Whitbeck reported that, despite concerns earlier in September that the Court would not balance its books by the end of the month, revenues had increased in mid- to late-September and the problem had been resolved.

As to FY06, which begins on October 1, 2005, a handout distributed in the meeting folder indicates that projected costs in FY06 represent an increase of 7.64% over our FY05 base of $17,911,800. The Governor's proposed budget for FY06 would have

[1] The business meeting was held at the MSU Tollgate Conference Center in Novi, following a Judges' Retreat on technology issues, strategic planning, and Court governance led by R. Dale Lefever, Ph.D.

provided a 6.34% increase, but the ultimate final appropriation provided only a 4.14% increase, leading to a projected shortfall of $626,922. In Chief Judge Whitbeck's view, this is the largest single shortfall in the past five or six years.

Shortly before the meeting, Finance Director Russ Rudd was advised that retirement costs projections had come in lower than anticipated, resulting in an FY06 "savings" to the Court of roughly $148,000. Further, employee subscriptions to the Plan A program for FY06 provided another $80,000 in savings, bringing the shortfall down to roughly $396,922. To accommodate this remaining shortfall, the Court will focus its attention on personnel costs, which make up 90% of our expenses. Common means of reducing such expenses include furlough days, banked leave time, reductions in the contract attorney program, and using attrition to effect staffing reductions. Each of these is under consideration. However, Chief Judge Whitbeck cautioned that the Supreme Court is considering whether to offer a 1.5% COLA, which this Court would probably be bound to offer as well due to fairness considerations. A COLA would increase this Court's negative position this year and going forward, given that it increases base salaries and must be included in any future step increases or new COLA's[2].

Chief Clerk Report

Sandra Mengel referred the judges to the Chief Clerk's report contained in the meeting folders. She then deferred to Denise Devine, Information System Director, who reported that electronic versions of Supreme Court orders are now accessible through the Case Inquiry option on the website, beginning with orders issued September 21, 2005. In the very near future, the IS Department will deploy an email notification service for

[2] It was decided subsequent to the meeting that COLA would not be given by either Court.

judges that will update them on Supreme Court orders issued in any case in which they recently participated at the Court of Appeals.

Research Director Report

Larry Royster reported that the Fall 2005 research attorney interviews are ongoing and that he is seeing very good candidates at the law schools. Preliminary call backs will occur in early November. A full report will be made at the December meeting.

Attorney Recruitment and Development Committee

Judge Schuette advised that he will report in December on the numbers and demographics of law students who applied for research attorney positions during the current interview season. He expressed his appreciation to all of the Judges who have participated in the interviews.

Court Rules Committee

No report was given.

Long Range Planning Committee

No report was given.

Personnel Committee

No report was given.

Settlement Committee

Judge Donofrio advised that settlements in 2005 are slightly ahead of the count in 2004. Between January and June 2005, 58 cases were settled (39.62%). In response to a question, Larry advised that the program is budgeted at about $200,000 annually

Technology Committee

No report was given.

Old Business - Oral Argument At Law Schools

As noted in the minutes of the April 2005 meeting, an ad hoc committee of judges was charged with the task of reviewing the question whether the Court should hold oral argument at local law schools. Judge Sawyer reported that the committee of judges appointed by Chief Judge Whitbeck had reviewed the issue and they recommended that the Court decline future invitations to hear oral argument outside of our own courtrooms. On a voice vote, the recommendation was approved.

New Business

No new business was introduced.

With no further business to discuss, the meeting was adjourned.